Other Related Offenses

3

3.1 Chapter Overview

This chapter discusses Michigan crimes governing sexual misconduct that fall outside the provisions of the Criminal Sexual Conduct Act ("CSC Act" or "Act"), MCL 750.520a et seq., discussed in Chapter 2. As such, the reader will find crimes that are sex-related in title and/or substance (i.e., covering sex-related conduct), as well as crimes that are sex-neutral in title and/or substance but which frequently occur in conjunction with sex-related crimes.

Note: Although the focus of this benchbook is on sexual crimes involving adult victims, some *sex-related* crimes involving children are also discussed.

The majority of crimes included in this chapter are sex-related in title and/or substance. Examples of such crimes include adultery, child sexually abusive activity, crimes against nature, dissemination of sexually explicit matter to minors, drug-facilitated criminal sexual conduct, gross indecency, seduction, and prostitution. The remaining crimes in this chapter are not sex related in title and/or substance. These crimes are included because they often arise as "precursor" or "wake" crimes to criminal sexual conduct or other related offenses. Precursor crimes are those crimes that occur *before* the intended commission of the sexual offense as a means of facilitating the offense. Examples of such crimes include kidnapping, aiding and abetting, and stalking. Additional examples of precursor crimes include the "inchoate" (pronounced in-KOH-it) crimes of attempt, conspiracy, and solicitation. Wake crimes are those crimes that occur *after* the commission of a sexual offense as a means of maintaining power and control over the victim and potential witnesses. Examples of such crimes include malicious use of phone service, obstruction of justice, and stalking.

Note: Federal crimes relating directly or indirectly to sexual assault are beyond the scope of this benchbook. For federal sex crimes, see 18 USC 2241 et seq. (sexual abuse, aggravated sexual abuse, and abusive sexual conduct); 18 USC 2251 (sexual exploitation of children); 18 USC 1470 (transfer of obscene materials to minors); and 18 USC 2421 et seq. (transporting individuals across state lines with intent to engage in prostitution or sexual activity). For other related federal crimes, see 18 USC 2261 et seq. (interstate domestic violence); 18 USC 2A6.1 (threatening and harassing communications); and 18 USC 921 et seq. (firearms).

Similar to the organization of Chapter 2 governing the CSC Act, the reader will find subsections in this chapter containing relevant statutory authority, elements of the offense (where available by case law or jury instruction), penalties, sex offender registration, and pertinent case law (where existing and relevant). Arranged alphabetically by their common or statutory title, the crimes are as follows:

- Accosting, enticing, or soliciting a child, MCL 750.145a. See Section 3.2.
- Adultery, MCL 750.29 et seq. See Section 3.3.
- Aiding and abetting, MCL 767.39. See Section 3.4.
- AIDS/HIV and sexual penetration, MCL 333.5210. See Section 3.5.
- Attempt, MCL 750.92. See Section 3.6.

- Child sexually abusive activity, MCL 750.145c. See Section 3.7.
- Conspiracy, MCL 750.157a. See Section 3.8.
- Crime against nature (sodomy/bestiality), MCL 750.158. See Section 3.9.
- Disorderly person (common prostitute/window peeper/indecent or obscene conduct), MCL 750.167. See Section 3.10.
- Dissemination of sexually explicit matter to minors, MCL 722.671 et seq. See Section 3.11.
- Drug-facilitated criminal sexual conduct, MCL 333.7401a, and MCL 333.7401b. See Section 3.12.
- Enticing female under 16, MCL 750.13. See Section 3.13.
- Extortion, MCL 750.213. See Section 3.14.
- Gross indecency, MCL 750.338 et seq. See Section 3.15.
- Human trafficking offenses, MCL 750.462a to 750.462i. See Section 3.16
- Indecent exposure, MCL 750.335a. See Section 3.17.
- Inducing a minor to commit a felony, MCL 750.157c. See Section 3.18.
- Internet and computer solicitation, MCL 750.145d. See Section 3.19.
- Kidnapping, MCL 750.349. See Section 3.20.
- Lewd and lascivious cohabitation/gross lewdness, MCL 750.335. See Section 3.21.
- Local ordinances governing misdemeanor sexual violence. See Section 3.22.
- Malicious use of phone service, MCL 750.540e. See Section 3.23.
- Obstruction of justice, MCL 750.122 and MCL 750.483a. See Section 3.24.
- Prostitution, soliciting and accosting, and pandering, MCL 750.449a (Prostitution), MCL 750.448 (soliciting and accosting), and MCL 750.455 (pandering). See Section 3.25.
- Seduction, MCL 750.532. See Section 3.26.
- Sex offender registration (failure to register), MCL 28.721 et seq. See Section 3.27.

- Sexual delinquency, MCL 750.10a (definition), and MCL 767.61a (procedures). See Section 3.28.
- Sexual intercourse under pretext of medical treatment, MCL 750.90. See Section 3.29.
- Solicitation to commit a felony, MCL 750.157b. See Section 3.30.
- Stalking and aggravated stalking, MCL 750.411h and MCL 750.411i. See Section 3.31.
- Unlawful imprisonment, MCL 750.349b. See Section 3.32.
- Vulnerable adult abuse, MCL 750.145n. See Section 3.33.

3.2 Accosting, Enticing, or Soliciting a Child

The Michigan Legislature has enacted a crime to protect children under age 16 from being accosted, enticed, or solicited by someone to engage in any of the following acts:

- Sexual intercourse.
- An act of gross indecency.*
- An immoral act.
- Any other act of delinquency or depravity.

*See Section 3.15 for more information on gross indecency.

A. Statutory Authority

MCL 750.145a* provides:

*2002 PA 45 amended MCL 750.145a, effective June 1, 2002.

> "A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both."

B. Penalties

A violation of MCL 750.145a is a felony punishable by imprisonment for not more than four years and a maximum $4,000.00 fine, or both.

Under MCL 750.145b(1), a person convicted of violating MCL 750.145a who also has one or more prior convictions* is guilty of a felony punishable by imprisonment for not more than 10 years or a maximum $10,000.00 fine, or both.

*A "prior conviction" means a violation of MCL 750.145a or a violation of another state's law substantially corresponding to MCL 750.145a. MCL 750.145b(3).

Under MCL 750.145b(2), a prosecutor who intends to seek an enhanced sentence must include on the complaint and information a statement listing the prior conviction(s). Additionally, the court, without a jury, must determine the existence of the defendant's prior convictions at sentencing or at a separate hearing before sentencing. *Id*. Finally, MCL 750.145b(2)(a)-(d) provides that the existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

> "(a) A copy of the judgment of conviction.
>
> "(b) A transcript of a prior trial, plea-taking, or sentencing.
>
> "(c) Information contained in a presentence report.
>
> "(d) The defendant's statement."

C. Sex Offender Registration

MCL 750.145a is a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

The crime of accosting, enticing, or soliciting a child under 16 years of age includes an essential element of "urging or entreating" the child to commit any of the enumerated acts in the statute. *People v Wheat*, 55 Mich App 559, 563-564 (1974). This "urging or entreating" was referred to as "suggesting" in *People v Riddle*, 322 Mich 199, 200 (1948).

3.3 Adultery

A. Statutory Authority

MCL 750.29 defines "adultery" as follows:

> "Adultery is the sexual intercourse of two persons, either of whom is married to a third person."

MCL 750.31 defines the complaint and time of prosecution for "adultery" as follows:

> "No prosecution for adultery, under the preceding section, shall be commenced, but on the complaint of the husband or wife; and no such prosecution shall be commenced after one year from the time of committing the offense."

B. Penalties

MCL 750.30 defines the penalty for "adultery" as follows:

> "Any person who shall commit adultery shall be guilty of a felony; and when the crime is committed between a married woman and a man who is unmarried, the man shall be guilty of adultery, and liable to the same punishment."

A violation of MCL 750.29 is a felony punishable by imprisonment for not more than four years or a maximum $5,000.00 fine, or both.*

*Regarding the imprisonment and fines, see MCL 750.503, Punishment of Felonies When Not Fixed by Statute.

C. Sex Offender Registration

MCL 750.29 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. Specific Intent Crime

Adultery is a specific intent crime. *People v Lipski*, 328 Mich 194, 197 (1950). However, consent is neither expressly stated nor implied by the statute, and courts should not read such a requirement into the statute. *Id*. In *Lipski*, a case decided before the passage of the CSC Act, the Court of Appeals reinstated a charge of assault with intent to commit adultery against the defendant, where the victim refused to consent to the adulterous act. *Id*. at 197.

2. Spousal Privilege

MCL 600.2162(8) prohibits the testimony of one spouse against another in an adultery action: "In an action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife are not competent to testify." However, MCL 600.2162(3)(a) provides that "in a suit for divorce, separate maintenance, or annulment," the spousal privileges and confidential communication privilege do not apply. Accordingly, to the extent that a

divorce suit, separate maintenance, or annulment action raises issues of adultery, the testimony of one spouse against the other regarding adultery is arguably admissible.

3.4 Aiding and Abetting

A sexual assault may involve multiple actors who, without directly participating in the assault, assist, encourage, or facilitate it. Accordingly, the general aiding and abetting statute in the Code of Criminal Procedure, MCL 767.39, is often invoked in the prosecution of such "indirect" offenders. This statute covers both aiders or abettors who commit the target offense and those who do not; the statute also abolishes the common-law distinction between accomplices and principals, and punishes accomplices as if they had directly committed the target offense.*

*For information on the CSC Act's "aided or abetted" element, see Section 2.5(C).

A. Statutory Authority

MCL 767.39 provides:

> "Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

B. Definition and Elements of Offense

The Michigan Supreme Court, in *People v Palmer*, 392 Mich 370, 378 (1974), defined "aiding and abetting" as follows:

> "In criminal law the phrase 'aiding and abetting' is used to describe all forms of assistance rendered to the perpetrator of a crime. This term comprehends all words or deeds which may support, encourage or incite the commission of a crime. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. . . . The amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime."

The Michigan Supreme Court, in *People v Carines*, 460 Mich 750, 757-758 (1999), citing *People v Turner*, 213 Mich App 558, 568-569 (1995), listed the elements of "aiding and abetting" as follows:*

*See also CJI2d 8.1.

1) The crime charged was committed by the defendant or some other person;

2) The defendant performed acts or gave encouragement that aided or assisted the commission of the crime; and,

3) The defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he or she gave aid and encouragement.

C. Penalties

MCL 767.39 states that aiders and abettors "shall be punished as if [they] had directly committed such offense." Therefore, aiders and abettors are subject to the maximum penalties of the target offense or offenses. If the target offense or offenses are silent on imprisonment and fines, see MCL 750.503, Punishment of Felonies When Not Fixed by Statute (four years/$2,000.00); and MCL 750.504, Punishment of Misdemeanors When Not Fixed by Statute (90 days/$100.00).

D. Sex Offender Registration

Aiders and abettors convicted of a target offense that is a "listed offense" under the Sex Offenders Registration Act (SORA) are subject to SORA's registration requirements. For more information on "listed offenses" and SORA's registration and public notification requirements, see Section 11.2.

E. Pertinent Case Law

1. Principal vs Aider and Abettor

For purposes of being charged, tried, convicted, and punished for violating a criminal statute, Michigan law does not distinguish between a principal and an aider and abettor. See MCL 767.39; and *People v Coomer*, 245 Mich App 206, 223 (2001).

2. Specific Intent Crimes

To be held criminally liable as an aider and abettor of a "specific intent" crime, the defendant must:

1) Have the requisite intent to commit the underlying offense; or,

2) Know that the actual perpetrator has the requisite intent.

People v Karst, 138 Mich App 413, 415 (1984).

However, "evidence of a shared specific intent to commit the crime of an accomplice is [not] the exclusive way to establish liability under [Michigan's] aiding and abetting statute." *People v Robinson*, 475 Mich 1, 7 (2006). The *Robinson* Court explained that the Legislature's abolition of the common-law distinction between principals and accessories did not eliminate the common-

law theory of an accomplice's liability for the probable consequences of the crime committed. Therefore, a defendant who intends to aid and abet the commission of a crime is liable for that crime and for "the natural and probable consequences of that crime." *Id*. at 9.

In *Robinson*, the defendant was properly convicted of second-degree murder when the victim of an assault died as a result of injuries inflicted by the defendant's accomplice even where the defendant said "that's enough" and walked away from his accomplice and the victim before the victim was shot. *Id.* at 4. Evidence showed that the defendant drove his accomplice to the victim's home and intended to participate with his accomplice in assaulting the victim. Said the *Robinson* Court:

> "In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder." *Id*. at 11.
>
> **Note:** A perpetrator aiding and abetting a specific intent crime may be liable for a general *or* specific intent offense. In *People v King*, 210 Mich App 425 (1995), the Court of Appeals held that aiders and abettors of specific intent crimes who are liable *only* because they know the perpetrator has the required specific intent are themselves liable for a general intent offense. This distinction between defendants who themselves have the requisite specific intent and those who only know the perpetrator has the requisite intent is important in determining which defenses to prosecution are appropriate. In *King*, the defendant was convicted of aiding and abetting an armed robbery, based on his knowledge that the perpetrator had the specific intent to rob. On appeal, he asserted he had erroneously been denied a jury instruction on voluntary intoxication. The Court of Appeals affirmed his conviction, stating the voluntary intoxication instruction was not required. (Voluntary intoxication was previously a defense only against specific intent crimes. See Section 4.13, for a discussion of this defense, which has now been generally eliminated by statute.) The Court concluded that although armed robbery is a specific intent crime, defendant's aiding and abetting offense entailed only general intent. Because defendant's conviction did not require a showing of his own specific intent, defendant was not entitled to an instruction on voluntary intoxication. *Id*. at 431.

The jury instruction on specific intent is CJI2d 3.9. This instruction should only be given if intent is disputed or if the jury expresses confusion about the intent required to convict. *People v Beaudin*, 417 Mich 570, 574-575 (1983). The jury instruction on general intent is CJI2d 6.1.

3. Scope of Criminal Enterprise

A perpetrator may commit an additional crime besides the one that he or she originally intended to commit. When an aider and abettor is involved with the perpetrator, it is crucial to determine whether any additional crime committed is within the scope of the criminal enterprise, i.e., whether the aider or abettor possessed the specific intent to commit the additional crime or knew that the actual perpetrator had the requisite intent to commit the additional crime. The following appellate cases illustrate this principal:

- *People v Poplar*, 20 Mich App 132 (1969) (defendant's conviction for aiding and abetting assault with intent to commit murder affirmed as within the scope of the criminal enterprise of breaking and entering a building, where defendant, who was a only a lookout for the other perpetrators, was aware of a shotgun's presence in the car prior to the break-in.)

- *People v Young*, 114 Mich App 61, 65 (1982) (defendant's conviction for aiding and abetting armed robbery affirmed, despite no evidence showing that defendant knew the perpetrator was carrying a gun: "It is only necessary that the evidence be sufficient to sustain the conclusion by the trier of fact that the defendant knowingly aided and abetted in the commission of the robbery and that carrying or using a weapon to commit the robbery was fairly within the scope of the common unlawful enterprise . . . .")

- *People v Wirth*, 87 Mich App 41, 49 (1978) (defendant's conviction for aiding and abetting extortion affirmed as within the scope of the criminal enterprise of kidnapping: "[He] intended to partake in whatever crime was planned and he did not care what it was . . . It could be concluded that defendant's intent encompassed all crimes, including extortion.")

- *People v Knapp*, 26 Mich 112, 114-115 (1872) (defendant's manslaughter conviction reversed as not being within the scope of the common enterprise, where he escaped by jumping out a window *before* one of the sexual assault perpetrators threw the victim out the same window, killing her.)

In certain circumstances, participating with others in a crime that precedes a rape, such as robbery, may be aiding and abetting the rape if the perpetrator knew of the plans to rape the victim. In *People v Gray*, 121 Mich App 788, 791 (1982), the defendant appealed his guilty plea convictions of armed robbery and CSC-I, arguing an inadequate factual basis to support his CSC-I conviction. The Court of Appeals disagreed, holding:

> "Defendant's plea was taken on the basis that he aided and abetted two other men who raped the robbery victim in the course of the robbery. Defendant knew of his cohorts' plans to rape the victim before they entered her house.

> Defendant himself went through the house looking for property to take while his accomplices took the victim to the back of her house to rape her. We think that the crime of aiding and abetting CSC-I is clearly made out from these facts. It was reasonable to infer that defendant, knowing of the plan to rape the robbery victim, rendered aid to the principals by his participation in the robbery, the event which rendered the victim helpless against her assailants." *Gray*, *supra* at 791.

4. Mere Presence Is Not Enough

The mere presence of a person at the location of a crime is not enough to make that person an aider or abettor, even if that person had knowledge that the crime is being committed. See *People v Rockwell*, 188 Mich App 405, 412 (1991), citing *People v Burrel*, 253 Mich 321 (1931); and *People v Killingsworth*, 80 Mich App 45, 50 (1977).

> **Note:** A mother's "silent presence" while watching her child engage in criminal sexual conduct does not necessarily equate to "mere presence" as long as other forms of assistance and encouragement are given. See *Sanford v Yukins*, 288 F3d 855, 862-863 (CA 6, 2002). For a history of this case in Michigan appellate courts, see *People v Wilson*, 196 Mich App 604 (1992); *People v Sanford*, 442 Mich 915 (1993); and *In re* Certified Question, *Sanford v Yukins*, 463 Mich 1202 (2000).

5. "Mutual Reassurance" Doctrine

A caveat to the "mere presence" rule is the "mutual reassurance" doctrine. By voluntarily choosing to join a group intent on committing a crime, a perpetrator can be as liable as a principal for contributing to the "psychological underpinnings" that give strength to the group. In *People v Smock*, 399 Mich 282 (1976), a consolidated case involving five defendants, a caravan of 20-30 cars with at least 40 people in the caravan trespassed on a construction site. The people from this caravan slashed and punctured construction vehicle fuel lines and fuel tanks, burned vehicle tires and buildings, poured fuel oil over lumber, and set assorted fires. While none of the defendants were seen perpetrating the acts of arson or vandalism, the defendants were part of the caravan, and rode in two separate cars (defendants Smock, Griswold, Sorenson, and Parson were in one car, and defendant Smith was in another). Smock, Griswold, Sorenson, and Parson got out of the car they were in and surrounded a car of construction employees attempting to leave. Smith got out of the other car and forcibly prevented an employee from locking a cable that would have barred entrance to the site. Apart from this, Parson and Sorenson smelled of fuel oil, and Griswold's fingerprints were found on a beer can located on the site near some burned buildings. On appeal, the Court of Appeals reversed the defendants' convictions. It found

insufficient evidence to connect them with the crimes. The Michigan Supreme Court reversed the Court of Appeal's decision, holding as follows:

> "In the circumstances of this case, nothing more is necessary to 'connect' these defendants to the crime. By voluntarily choosing to join a group that was intent on committing the crime of arson, these defendants *took action* which supported, encouraged and incited its commission. By so joining, they contributed to the psychological underpinnings that give strength to a 'mob' through the device of mutual reassurance. They also contributed to the effect of a mob on those who oppose it. In this case, the few employees who were present when the caravan arrived indicated that they felt helpless in the face of so large a group. . . . These defendants chose to cast their lot with others who were bent on arson and by doing so they lent active support to the criminal enterprise. The mere fact that a large number of people was involved in this undertaking cannot shield these defendants." *Id*. at 284-285. [Emphasis in original.]

6. Underlying Crime Must Be "Committed"

A person cannot be convicted of aiding and abetting unless some underlying crime was committed. While conviction of the principal who committed the underlying crime is not necessary to convict an aider or abettor to that crime, the prosecution must prove beyond a reasonable doubt that the underlying crime was committed by someone and the defendant either aided or abetted the commission of that crime or actually committed it. See *People v Mann*, 395 Mich 472, 478 (1975); *People v Burgess*, 67 Mich App 214, 217 (1976); and *People v Brown*, 120 Mich App 765, 770-772 (1982).

7. Identity of Principal Need Not Be Established

The identity or specific name of the principal need not be proven. In *People v Vaughn*, 186 Mich App 376 (1990), the Court of Appeals affirmed defendant's CSC-I conviction, MCL 750.520b(1)(d) (aided or abetted by 1 or more persons)* under the general aiding abetting statute, MCL 767.39, and his CSC-III conviction, MCL 750.520d(1)(b) (force or coercion), for raping a 21-year-old woman and for assisting another person, "a tall, dark, skinny man," who got "on top of [the woman] and inserted his penis into her vagina." *Vaughn*, *supra* at 378. Although the principal's identity was never established at trial, the Court of Appeals held:

*For information on the CSC Act's "aided or abetted" provision, see Section 2.5(C).

> "[T]he evidence was overwhelming that there was a guilty principal, albeit his name, rank, and social security number remains unknown. . . . This is not a case of a phantom rape or a phantom rapist. Only the rapist's identity remains unknown. Therefore, we find that the prosecution

> presented legally sufficient evidence to support defendant's conviction as an aider and abettor." *Id*. at 382-383.

See also *People v Wilson*, 196 Mich App 604, 611 (1992), lv den 442 Mich 917 (1997), a case that relied upon the holding of *Vaughn*, and which involved multiple, unidentified perpetrators.

8. Alternative Theories and Jury Unanimity Instructions

If a prosecutor argues alternative theories of guilt, i.e., the defendant is either guilty as a principal or as an aider and abettor, a jury does not have to unanimously decide whether the defendant was a principal or an aider and abettor. *People v Paintman*, 92 Mich App 412, 418 (1979), rev'd on other grounds 412 Mich 518 (1982). A general verdict of guilty, without specifying which alternative theory was relied on, does not violate a defendant's right to a unanimous verdict. *People v Smielewski*, 235 Mich App 196, 201-202 (1999).

9. A Conviction for Each Sexual Penetration or Contact

A defendant charged with aiding and abetting criminal sexual conduct under the general aiding and abetting statute, MCL 767.39, may be convicted of each penetration or contact committed by the principals, as long as the defendant aided or abetted each specific penetration or contact. *People v Pollard*, 140 Mich App 216, 218-220 (1985).

10. Aiding and Abetting Statute Applies to Criminal Sexual Conduct Offenses

The aiding and abetting statute applies to criminal sexual conduct, even though CSC-I and II contain an "aided or abetted" provision. See *People v Pollard*, *supra* at 220-221; MCL 750.520b(1)(d) (CSC-I—Penetration); and MCL 750.520c(1)(d) (CSC-II—Contact).

> **Note:** Although *Pollard* was decided under CSC-I, the rationale presumably applies to CSC-II because the language in the CSC-II statute is substantially similar to the language in the CSC-I statute. For more information on the CSC Act's "aided or abetted" provisions, see Section 2.5(C).

3.5 AIDS/HIV and Sexual Penetration

MCL 333.5210 prohibits a person who knows he or she has been diagnosed with AIDS (or who knows that he or she is HIV infected) from engaging in sexual penetration with another person without first informing that other person of the diagnosis or infection.

A. Statutory Authority

MCL 333.5210 provides:

> "(1) A person who knows that he or she has or has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony."
>
> "(2) As used in this section, 'sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."*

*This definition of "sexual penetration" is identical to the CSC Act's definition. See Section 2.5(W).

B. Penalties

A violation of MCL 333.5210 is a felony punishable by imprisonment for not more than four years or a maximum $5,000.00 fine, or both.*

*Regarding the imprisonment and fine, see MCL 750.503, Punishment of Felonies When Not Fixed by Statute

C. Sex Offender Registration

MCL 333.5210 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

Note: Appellate courts have addressed a number of issues arising from the application of MCL 333.5210. Most of these issues were decided in a trilogy of cases: *People v Jensen*, 222 Mich App 575 (1997); *People v Jensen*, 456 Mich 935 (1998); and *People v Jensen (On Remand)*, 231 Mich App 439 (1998). The first *Jensen* opinion decided various non-constitutional issues, such as the statute's mens rea requirements and the admissibility of hearsay statements. However, it did not address the defendant's constitutional arguments because they were not preserved for appellate review. In the second *Jensen* opinion, the Michigan Supreme Court vacated the Court of Appeals' judgment in the *Jensen* opinion and remanded the case back to the Court of Appeals for a determination of whether the MCL 333.5210 was constitutional. The resulting Court of Appeals decision, *Jensen*

(On Remand), upheld the constitutionality of the statute. Accordingly, the non-constitutional mens rea issue in the first *Jensen* opinion and the constitutional issues in *Jensen (On Remand)* are discussed below.

1. AIDS and HIV Definitions

AIDS is defined as a "syndrome that involves a compromised immune system that renders the [person] highly susceptible to" communicable diseases. AIDS occurs "when an individual is seropositive for HIV *and* has one of certain associated illnesses, and . . . when an individual with HIV contracts any one of a multitude of possible opportunistic infections." *People v Jensen (On Remand)*, *supra* at 443 n 1, quoting *Sanchez v Lagoudakis (After Remand)*, 458 Mich 704, 709 (1998). [Emphasis in original.]

2. Mens Rea and Consent Defense

MCL 333.5210 is a general intent crime. *Jensen (On Remand)*, *supra* at 454.

Regarding AIDS, this statute requires that a person "knows that he or she has," or "has been diagnosed as having," AIDS. Regarding HIV, the statute requires only that a person "know" that he or she is infected, making no mention of an HIV *diagnosis*. See *People v Jensen*, 222 Mich App 575, 583-584 (1997).

The defense of consent applies. *People v Jensen (On Remand)*, *supra* at 455 ("[I]f a defendant admits being HIV infected and the other person consents to the physical contact despite the risks associated with such contact, there is no criminal liability.")

3. Private Disclosure Only

MCL 333.5210 requires only private disclosure of one's health status as an AIDS or HIV carrier to those "immediately in danger of exposure to the virus." No public disclosure is required. *Id.* at 464.

4. Right to Privacy and Right Against Compelled Speech

This statute is neither constitutionally overbroad nor violative of a defendant's right to privacy or right against compelled speech. *Id.* 446-447, 461, 465.

3.6 Attempt

The law of attempt is one of three "inchoate" offenses discussed in this chapter.* An inchoate (pronounced in-KOH-it) offense is defined as a "step toward the commission of another crime, the step in itself being serious enough to merit punishment." *Black's Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 1108. The law of attempt in Michigan is defined as the

*The other inchoate offenses are conspiracy and solicitation. See Sections 3.8 and 3.29, respectively.

specific intent to commit a crime, coupled with an overt act that goes beyond mere preparation. *People v Stapf*, 155 Mich App 491, 494 (1986).

A. Statutory Authority and Penalties

MCL 750.92 provides:

> "Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:
>
> > "1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;
> >
> > "2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;
> >
> > "3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed."

B. Elements of Offense

1. Case Law

People v Stapf, 155 Mich App 491, 494 (1986), delineates the elements for the crime of attempt:

1) The specific intent to commit a crime; and,

2) An overt act going beyond mere preparation toward committing the crime.

Note: While some Court of Appeal's opinions establish "a failure to consummate the crime" as a third element to the crime of attempt, see *People v Lucas*, 47 Mich App 385, 387 (1973), other opinions hold that evidence establishing the consummation of the crime does not prevent a valid conviction. See, e.g., *People v Pickett*, 21 Mich App 246, 248 (1970); and *People v Miller*, 28 Mich App 161, 164 (1970). See also CJI2d 9.1(4).

2. Criminal Jury Instruction

The elements of "attempt" are listed in CJI2d 9.1 and paraphrased below as follows:

1) First, that the defendant intended to commit [state elements from appropriate crime].

2) Second, that the defendant took some action toward committing the alleged crime, but failed to complete the crime.

3) You may convict the defendant of attempting to commit [state crime] even if the evidence convinces you that the crime was actually completed.

C. Sex Offender Registration

An attempt to commit a "listed offense" is defined as a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. Application of Attempt Statute

The attempt statute can be applied only where no express provision for "attempts" exists in the statute charged. *People v Denmark*, 74 Mich App 402, 416 (1977). Compare, however, *People v Loveday*, 390 Mich 711 (1973), in which the defendant was convicted of attempted gross indecency under the attempt statute, even though a separate crime of attempt to procure an act of gross indecency is contained in the gross indecency statute.

2. Specific Intent Crime

The crime of attempt is a specific intent crime. *People v Langworthy*, 416 Mich 630, 644-645 (1982). It is a separate, substantive offense punishable under its own statute, and not merely one that modifies the punishment

applicable to the completed offense. *People v Johnson*, 195 Mich App 571, 575 (1992).

3. Penalties

No fines or costs are authorized under the attempt statute; accordingly, a trial court lacks authority to impose fines and costs under the attempt statute. *People v Krieger*, 202 Mich App 245, 247 (1993).

Probation is a sentence alternative under the attempt statute, even though the offense attempted may be precluded from probation under MCL 771.1(1). *People v McKeown*, 228 Mich App 542, 545 (1998) ("[T]he Legislature did not include the attempt statute in the list of felonies [delineated in the probation statute] for which a defendant could not be given probation. Therefore . . . the Legislature evidenced an intent to include probation as another alternative sentence under the attempt statute.")

The phrase—"but in no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed"—contained in subparagraph (3) of MCL 750.92, which involves offenses with maximum penalties less than five years, applies to the entire statute, not just subparagraph (3). *Loveday*, *supra* at 713-716. Accordingly, under subparagraph (2) of the attempt statute, an attempt to commit a five-year felony is a two and one-half year felony. *Id*.

4. Voluntary Abandonment

Voluntary abandonment is an affirmative defense to criminal attempt; the burden is on defendant to establish by preponderance of evidence that he or she has voluntarily and completely abandoned his or her criminal purpose. See *People v Kimball*, 109 Mich App 273 (1981), modified on other grounds 412 Mich 890 (1981); and CJI2d 9.4. For more information on the voluntary abandonment defense, see Section 4.3.

5. Impossibility Defense

The doctrine of impossibility does not provide a defense to a charge of attempt to commit an offense. In *People v Thousand*, 465 Mich 149 (2001), the Supreme Court reversed the circuit court's dismissal of a charge of attempted distribution of obscene material to a minor, finding the doctrine of impossibility does not apply, even when the alleged distribution of obscene material was to an undercover detective who was not, in fact, a minor. The Court held that "[t]he notion that it would be 'impossible' for the defendant to have committed the *completed* offense is simply irrelevant to the analysis." *Id*. at 166. (Emphasis in original.) Instead, the Supreme Court held that the prosecution need only prove "intention to commit an offense prohibited by law, coupled with conduct toward the commission of that offense."* *Id*.

*See Section 4.9 for more information on the defense of impossibility defense and a discussion of the *Thousand* case.

3.7 Child Sexually Abusive Activity

Michigan's child sexually abusive activity statute focuses on protecting children from sexual exploitation. "The purpose of the statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography." *People v Ward*, 206 Mich App 38, 42-43 (1994). The statute proscribes three general types of activities:

- Creating child sexually abusive material through knowingly persuading, inducing, enticing, coercing, causing, or allowing a child to engage in child sexually abusive activity, or the producing, making, or financing of any child sexually abusive activity or material, MCL 750.145c(2).
- Distributing, promoting, or financing the distribution or promotion of any child sexually abusive material, MCL 750.145c(3).
- Possession of child sexually abusive material, MCL 750.145c(4).

A. Statutory Authority

1. Creation of Child Sexually Abusive Matter

MCL 750.145c(2) prohibits the creation of child sexually abusive matter, as follows:

> "A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make or finance any child sexually abusive activity or child sexually abusive material is guilty of a felony, punishable by imprisonment for not more than 20 years, or a fine of not more than $100,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child."

2. Distribution or Promotion of Child Sexually Abusive Material

MCL 750.145c(3) prohibits the distribution or promotion of child sexually abusive material, as follows:

> "A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to the persons described in [MCL 752.367 (governing exemptions from first- and second-degree obscenity)].

Note: MCL 752.367 exempts the following individuals or institutions from the application of MCL 750.145c(3): (1) an employee or member of the board of directors of a public college, university, vocational school, or of a state or local or community college library, or of a nonprofit art museum; (2) an individual who disseminates obscene material in the course of employment and has no discretion regarding that dissemination, or is not in management; (3) any portion of a business regulated by the federal communications commission; and (4) a cable television operator subject to the communications act of 1934, 47 USC 151 et seq.

3. Possession of Child Sexually Abusive Material

MCL 750.145c(4) prohibits the possession of child sexually abusive material, as follows:

> "A person who knowingly possesses any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to any of the following:

> "(a) A person described in [MCL 752.367 (governing exemptions from first- and second-degree obscenity)], a commercial film or photographic print processor acting pursuant to subsection (8), or a computer technician acting pursuant to subsection (9).*
>
> "(b) A police officer acting within the scope of his or her duties as a police officer.
>
> "(c) An employee or contract agent of the department of social services acting within the scope of his or her duties as an employee or contract agent.
>
> "(d) A judicial officer or judicial employee acting within the scope of his or her duties as a judicial officer or judicial employee.
>
> "(e) A party or witness in a criminal or civil proceeding acting within the scope of that criminal or civil proceeding.
>
> "(f) A physician, psychologist, limited license psychologist, professional counselor, or registered nurse licensed under the public health code [MCL 333.1101-333.25211], acting within the scope of practice for which he or she is licensed.
>
> "(g) A social worker registered in this state under article 15 of the public health code [MCL 333.16101-333.18838], acting within the scope of practice for which he or she is registered."

*MCL 750.145c(8) and MCL 750.145c(9) create immunity from civil liability and protect as confidential the identity of a commercial film or photographic print processor or a computer technician who reports a depiction of a child engaged in a listed sexual act to a law enforcement agency.

Determining whether images stored in temporary Internet or deleted files on the defendant's computer could establish his knowing possession of child sexually abusive material was unnecessary where the complainant and the defendant's wife testified that the "defendant look[ed] at images of adolescents on his computer screen for extended periods of time, including during the course of engaging in sexual acts [and] defendant's friend testified that defendant had emailed him pictures of nude children." *People v Girard*, 269 Mich App 15, 23 (2005).

B. Penalties

1) Creation of child sexually abusive material as described in MCL 750.145c(2) is a felony punishable by imprisonment for not more than 20 years, or a maximum $100,000.00 fine, or both.

2) Distribution/promotion of child sexually abusive material as described in MCL 750.145c(3) is a felony punishable by

imprisonment for not more than seven years, or a maximum $50,000.00 fine, or both.

3) Possession of child sexually abusive material as described in MCL 750.145c(4) is a felony punishable by imprisonment for not more than four years, or a maximum $10,000.00 fine, or both.

C. Sex Offender Registration

MCL 750.145c is a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Relevant Statutory Terms

MCL 750.145c(1) contains statutory terms and definitions used under the child sexually abusive material statutes. Some of these terms and definitions are as follows:

a) "Appears to include a child" means "that the depiction appears to include, or conveys the impression that it includes, a person who is less than 18 years of age, and the depiction meets either of the following conditions:

> "(*i*) It was created using a depiction of any part of an actual person under the age of 18.
>
> "(*ii*) It was not created using a depiction of any part of an actual person under the age of 18, but all of the following apply to that depiction:
>
> > "(A) The average individual, applying contemporary community standards, would find the depiction, taken as a whole, appeals to the prurient interest.
> >
> > "(B) The reasonable person would find the depiction, taken as a whole, lacks serious literary, artistic, political, or scientific value.
> >
> > "(C) The depiction depicts or describes a listed sexual act in a patently offensive way." MCL 750.145c(1)(a).

b) "Child" means "a person who is less than 18 years of age, subject to the affirmative defense created in subsection (6) [MCL 750.145c(6)] regarding persons emancipated by operation of law." MCL 750.145c(1)(b).

c) "Child sexually abusive activity" means "a child engaging in a listed sexual act." MCL 750.145c(1)(k).

d) "Child sexually abusive material" means "any depiction, whether made or produced by electronic, mechanical, or other means, including a developed or undeveloped photograph, picture, film, slide, video, electronic visual image, computer diskette, computer or computer-generated image, or picture, or sound recording which is of a child or appears to include a child engaging in a listed sexual act; a book, magazine, computer, computer storage device, or other visual or print or printable medium containing such a photograph, picture, film, slide, video, electronic visual image, computer, or computer-generated image, or picture, or sound recording; or any reproduction, copy or print of such a photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording." MCL 750.145c(1)(*l*).

e) "Contemporary community standards" means "the customary limits of candor and decency in this state at or near the time of the alleged violation of this section." MCL 750.145c(1)(d).

f) "Prurient interest" means "a shameful or morbid interest in nudity, sex, or excretion." MCL 750.145c(1)(j).

E. Pertinent Case Law

1. First Amendment Concerns

The child sexually abusive activity statute is not unconstitutionally overbroad, and its definition of "erotic nudity," which was amended in 1994 to eliminate the exemption for depictions that have "primary literary, artistic, educational, political, or scientific value," is narrowly drawn and does not punish protected forms of free speech in violation of the First Amendment, US Const, Am I. *People v Riggs*, 237 Mich App 584, 594 (1999).

2. Double Jeopardy and Sufficiency of Evidence Concerns

Convictions for both child sexually abusive activity and CSC-I (commission of any other felony) or CSC-II (commission of any other felony)* do not violate the Double Jeopardy Clause's prohibition against multiple punishments. See *People v Ward*, 206 Mich App 38, 42-43 (1994) (the CSC statutes at issue and the child sexually abusive activity statute prohibit conduct that is violative of distinct social norms).

*The "other" felony on each CSC charge was child sexually abusive activity. *People v Ward*, 206 Mich App 38, 41 (1994).

In child sexually abusive activity cases involving videotapes and photographs, Michigan appellate courts have ruled on double jeopardy and sufficiency of the evidence issues by analyzing two factual variables: the number of *videotapes* or *photographs*, and the number of *victims* depicted in the videotapes or photographs. In *People v Hack*, 219 Mich App 299, 306 (1996) lv den 456 Mich 884 (1997), the Court of Appeals upheld on double jeopardy grounds two convictions of child sexually abusive activity under MCL 750.145c(2) based on one videotape of two children (a three-year-old female performing fellatio on a one-year-old male):

> "We find [the] language [of the child sexually abusive activity statute] to clearly provide that a felony has been committed when a person induces one child to perform prohibited acts. Because it is undisputed that two children were involved in this case, we conclude defendant was properly charged with and convicted of two counts of this crime." *Hack, supra* at 306.

In deciding *Hack*, the Court of Appeals recognized and distinguished one of its earlier cases, *People v Smith*, 205 Mich App 69 (1994), by noting that *Smith* involved multiple photographs of one victim, while the facts in *Hack* established multiple acts (and one videotape) committed against two children:

> "This Court's opinion in [*Smith*] does not compel a different result. In *Smith*, this Court determined that the defendant could only be convicted once for multiple photographs taken of the same victim at one time. Here, however, we are dealing with multiple acts committed against two victims. Accordingly, this Court's opinion in *Smith* does not govern the outcome of this case." *Hack, supra* at 306-307. [Citation omitted.]

In *Smith*, *supra* at 72-73, the Court of Appeals upheld only one of defendant's four child sexually abusive activity convictions based on evidence that he took multiple pictures of one child holding "her privates," i.e., masturbating, on at least one occasion. The Court in *Smith* noted that the prosecution could not establish the exact number of pictures taken of the victim, or even the exact number of occasions on which the conduct occurred. However, based on the victim's testimony specifically describing one occasion on which defendant took photographs, the Court upheld one conviction based on sufficiency of the evidence. The Court explained the evidence and its holding as follows:

> "[T]he evidence presented by the prosecutor was scant with respect to the number of occasions on which this conduct occurred. Even viewing the evidence in the light most favorable to the prosecutor, we can conclude that defendant took more than one photograph, but only on one occasion. It cannot be discerned from the victim's testimony exactly how many photographs were taken (she only refers to 'pictures' in the plural) and the victim only specifically described one occasion on which defendant took photographs. Accordingly, while we conclude that the witness did give testimony sufficient to allow the conclusion by the jury that defendant committed one count of child sexually abusive activity, we cannot say that there was sufficient evidence to justify the conclusion that defendant committed four counts of child sexually abusive activity. Accordingly, we set aside three of defendant's

> four convictions . . . leaving in place only one conviction and sentence for that offense." *Id.*

In *People v Harmon*, 248 Mich App 522 (2001), the Court of Appeals revisited its earlier decisions and found that the number of photographs and victims—not the number of photographic sessions—are the relevant factors in deciding sufficiency of the evidence (and presumably double jeopardy) questions. In *Harmon*, the defendant was convicted of four counts of making child sexually abusive material for taking four photographs of two nude 15-year-old girls (two of each girl) during one photographic session. On appeal, relying on *Smith*, *supra*, the defendant contended that the evidence only supported two convictions, one for each girl, since the photographs derived from only one photographic session. The Court of Appeals rejected defendant's argument, finding sufficient evidence to support all four convictions. However, in finding sufficient evidence, the Court addressed its earlier interpretation of the *Smith* case, made in *Hack*, *supra*, and concluded that it was erroneous:

> "[W]e do not believe that *Hack* set forth the correct interpretation of *Smith*. Contrary to the assertion in *Hack*, the *Smith* Court did *not* explicitly state that a 'defendant could only be convicted once for multiple photographs taken of the same victim at one time.' . . .
>
> Indeed, in vacating three of the defendant's convictions in *Smith*, this Court was swayed by the lack of evidentiary specificity with regard to the number of photographs. . . . The *Smith* panel may have been concerned, for example, that less than four photographs were taken or that certain of the photographs were not sufficiently lascivious to support a conviction under MCL 750.145c(2). In the instant case, by contrast, the prosecutor presented four photographs that the trial court specifically concluded were lascivious. In light of this evidence, we can discern no reason why defendant could not be convicted of four counts of 'mak[ing] . . . child sexually abusive material' under MCL 750.145c(2). Indeed, defendant made four 'photograph[s]' under MCL 750.145c(2) and therefore could be convicted of four counts under the plain language of the relevant statutes. [Citation omitted.] *Smith* is sufficiently distinguishable from the instant case; no error occurred here with regard to the number of convictions." *Harmon*, *supra* at 527-528. [Emphasis in original.]*

*The Court found that *Hack*'s interpretation of *Smith* was dicta. *Harmon*, *supra* at 527.

3. Statute Not Limited to a "Class of Offenders"

The prohibition in MCL 750.145c(2) against creating child sexually abusive material is not restricted to a class of offenders responsible for the care of the child. In *People v Pitts*, 216 Mich App 229 (1996), a case where the defendant

surreptitiously videotaped his sexual intercourse with a 16-year-old girl and later showed it to others, the Court of Appeals reinstated the original charge of creating child sexually abusive activity, which the trial court reduced to distributing child sexually abusive material. The Court reinstated the charge because it found that the statute did not limit the proscribed conduct to a "class of offenders" responsible for the care of the child.

4. Definition of Terms

"Producing" under MCL 750.145c(2) means "to create" or "bring into existence." Accordingly, the mere creation of a videotape of child sexually abusive material, by itself, is actionable under the statute; no proof of an intent to distribute is required under MCL 750.145c(2). *Hack*, *supra* at 305-306.

A person "produces" or "makes" child sexually abusive material when the person reproduces prohibited images by copying them to a recordable compact disc (CD-R). *People v Hill*, 269 Mich App 505, 516–517 (2006). In *Hill*, the defendant argued that he was improperly charged with violating MCL 750.145c(2) because he merely possessed child sexually abusive material. The defendant asserted that his conduct of copying images he had downloaded from an internet website onto CD-Rs was not the equivalent of producing child sexually abusive material; instead, the defendant argued that his copies on CD-Rs represented only the storage of child sexually abusive material. *Hill*, *supra* at 511. The circuit court disagreed and bound the defendant over on charges that he violated MCL 750.145c(2).

The Court of Appeals affirmed the circuit court's conclusion that "following the mechanical and technical act of burning images onto the CD-Rs, something new was created or made that did not previously exist" so that the defendant was properly charged with violating MCL 750.145c(2). *Hill*, *supra* at 513. The Court of Appeals noted that MCL 750.145c(1)(m) specifically defines "child sexually abusive material" as "any reproduction, copy, or print of [a prohibited] photograph, picture, film, slide, video, electronic visual image, book, magazine, computer, or computer-generated image, or picture, other visual or print or printable medium, or sound recording." *Hill, supra* at 510. According to the *Hill* Court, notwithstanding the plain language of the statute that criminalizes the defendant's conduct,

> "[t]he evidence reflects that defendant burned the illegal images and videos onto the CD-Rs, thereby placing child sexually abusive material on new storage devices, the CD-Rs, which material was compiled in a format and manner determined solely by defendant, considering that he personally burned and spliced particular picture and video files onto particular CD-Rs. The CD-Rs, as compiled by defendant, were defendant's own creations; he made child-pornography CD-Rs." *Hill, supra* at 517–518.

"Erotic nudity" generally does not include depictions of innocent child nudity, although one's editing actions of such depictions may transform them into "erotic nudity." In *People v Riggs*, 237 Mich App 584 (1999), the defendant created two videotapes. The first videotape depicted twin girls, aged 10, playing together as defendant focused the videocamera on their crotch areas. At one point, one child exposed her vaginal area, which was depicted on the screen for over two minutes. Defendant edited the tape to focus on, slow down, and replay this scene. The second videotape depicted two sisters, aged eight and ten, watching themselves on a television monitor; one child lifted her shirt and then, afterward, exposed her vaginal area. The child's "full body" was observed on the tape. Defendant's only editing actions were to replay the scene twice more on the tape at regular speed. The trial court dismissed all four counts of creating child sexually abusive activity, MCL 750.145c(2). The prosecutor appealed two dismissed charges, contending that defendant's editing of the tapes turned innocent nudity into "erotic nudity." Defendant contended the children were not engaged in "sexual activity" but only in displaying ordinary nudity, a protected activity under the First Amendment. The Court of Appeals disagreed:

> "Contrary to defendant's position, the statute does not require that the children actually be engaging in sexual activity at the time the activity is memorialized on tape. Rather, the statute prohibits the making of a visual image that is a likeness or representation of a child engaging in one of the listed sexual acts. . . . Misappropriating the innocent image of a child for purposes of creating the appearance of a child engaging in a listed sexual act while different in kind from the damage that arises from actually subjecting a child to the actual act is nonetheless exploitative and, arguably, equally as damaging. A child whose innocuous image has been altered to create sexually explicit pictures has its innocence violated. Moreover, ordinary nudity that has been enhanced to depict something lewd and preserved on tape has the potential of being a source of great humiliation, embarrassment, and mental and emotional distress to the child who may be unable to appreciate her innocent role in the creation and only able to focus on the end product." *Riggs*, *supra* at 590-591.

Regarding the first videotape, the Court of Appeals found that, if proved, defendant's actions in editing the tape would be violative of the statute:

> "There was sufficient evidence on which to conclude that defendant focused a video camera on the crotch area of a child and videotaped that child's otherwise innocent behavior of exposing her genital area. The evidence supported the conclusion that defendant edited the tape to slow down and stop the taped images to display a closeup

> scene of the child's nude genital area, keeping the scene displayed on the edited tape for over two minutes and then repeating the scene twice more in slow motion. Such conduct, if proved, would constitute the making of images depicting erotic nudity of a child, in violation of MCL 750.145c(2)." *Id*. at 592.

Regarding the second videotape, the Court of Appeals found that defendant's actions did not violate the statute:

> "No images on that tape constitute child sexually abusive material. This tape merely shows innocent child nudity. While defendant allegedly edited the tape to display the nudity three times, the replay is at normal speed and the camera was not focused exclusively on the child's genital area. Such child nudity does not constitute the display of 'erotic nudity,' as that term is statutorily defined." *Id.* at 593.

Note: The Court of Appeals in *Riggs* provided a cautionary note regarding the repeated display of child nudity: "Our opinion should not be construed as holding that the repeated display of child nudity as a matter of law can never constitute a violation of MCL 750.145c." *Id*. at n 3.

"Preparing" via the Internet to engage in sexually abusive activity with a child, who is actually an undercover police officer pretending to be a child, is not legally impossible and is thus actionable under MCL 750.145c(2). *People v Thousand*, 241 Mich App 102, 113-117 (2000).*

*For more information on this case and legal and factual impossibility, see Section 4.9.

See also *People v Adkins*, 272 Mich App 37, 38 (2006), where the defendant was properly convicted of violating MCL 750.145c(2) when he communicated via the Internet with a law enforcement officer posing as a minor. The conduct prohibited under MCL 750.145c(2) includes the mere preparation to engage in child sexually abusive activity, and in *Adkins*, the evidence established that the defendant's communication with the perceived minor was in preparation for child sexually abusive activity. *Adkins, supra* at 47.

In *People v Tombs*, 472 Mich 446, 448 (2005), the Supreme Court upheld the Court of Appeals' finding in *People v Tombs*, 260 Mich App 201 (2003), that MCL 750.145c requires an intent to disseminate child sexually abusive materials to others. In upholding the Court of Appeals decision, the Court reviewed United States Supreme Court precedent addressing the issue of whether a criminal intent element should be read into a statute where it does not appear. See *Morissette v United States*, 342 US 246 (1952), *Staples v United States*, 511 US 600 (1994), and *United States v X-Citement Video, Inc*, 513 US 64 (1994). In applying the foregoing precedent to this case the Court held:

> "No *mens rea* with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence suggests the Legislature's intent not to eliminate *mens rea* in MCL 750.145c(3)." *Tombs, supra,* 472 Mich at 456-57.

The Court clarified the elements of distribution or promotion of child sexually abusive material under MCL 750.145c(3) as follows:

> "(1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent." *Tombs, supra,* 472 Mich at 465.

The Court also held "that the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3)." *Tombs, supra,* 472 Mich at 465.

"Distributes" is not defined in MCL 750.145c. In *People v Tombs*, 260 Mich App 201, 210 (2003), the Court of Appeals stated that the word "distributes" "comprises several definitions that each describe different conduct" and is therefore ambiguous. In order to provide meaning to the word "distributes," the Court turned to the legislative purpose behind the statute. The Court concluded that a narrow construction of "distributes" properly avoids criminalizing transferring material to authorities or disposing of material. Therefore, "distributing" requires the "intent to disseminate child sexually abusive materials to others." Id. at 216.

In *Tombs,* the defendant was convicted of distributing child sexually abusive material. As a part of the defendant's employment, he was given a laptop computer to use. When the defendant quit his job, the employer retrieved the laptop and found child sexually abusive material on the computer's hard drive. A jury found the defendant guilty of distributing child sexually abusive material for "distributing" the material through the laptop computer to his employer. On appeal, the defendant claimed that he did not intend to distribute child sexually abusive material. The defendant indicated that he believed the company was going to erase the hard drive without viewing its contents. The Court of Appeals reversed the defendant's conviction, holding that in order to prove that a defendant "distributed" the material, the prosecutor must prove that the defendant intended to disseminate the material. Id.

F. Affirmative Defenses

MCL 750.145c(6) provides an affirmative defense to the crime of child sexually abusive activity under MCL 750.145c if "the alleged child is a person

who is emancipated by operation of law under [MCL 722.4], as proven by a preponderance of the evidence."

A defendant intending to offer evidence to establish that a depiction is not, in fact, an actual person under age 18 must provide notice of his or her intent to raise that defense. MCL 750.145c(7) provides as follows:

> "If a defendant in a prosecution under this section proposes to offer in his or her defense evidence to establish that a depiction that appears to include a child was not, in fact, created using a depiction of any part of an actual person under the age of 18, *the defendant shall at the time of the arraignment on the information or within 15 days after arraignment but not less than 10 days before the trial of the case*, or at such other time as the court directs, file and serve upon the prosecuting attorney of record a notice in writing of his or her intention to offer that defense. The notice shall contain, as particularly as is known to the defendant or the defendant's attorney, the names of witnesses to be called in behalf of the defendant to establish that the depiction was not, in fact, created using a depiction of any part of an actual person under the age of 18. Failure to file a timely notice in conformance with this subsection precludes a defendant from offering this defense." [Emphasis added.]

3.8 Conspiracy

*The other inchoate offenses are attempt and solication. See Sections 3.6 and 3.29, respectively.

The law of conspiracy is one of three "inchoate" (pronounced in-KOH-it) offenses discussed in this chapter.* An inchoate offense is defined as a "step toward the commission of another crime, the step in itself being serious enough to merit punishment." *Black's Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 1108. A "conspiracy" is an agreement between two or more persons to commit an illegal act or a legal act in an illegal manner. *People v Ayoub*, 150 Mich App 150, 153 (1985).

Conspiracies involving Michigan's criminal sexual conduct offenses, or any other sex-related crime, are proscribed under the general conspiracy statute in the Michigan Penal Code, MCL 750.157a.

A. Statutory Authority

MCL 750.157a provides:

> "Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . ."

B. Elements of Offense

1. Case Law

People v Ayoub, 150 Mich App 150, 153 (1985) provides the elements for the crime of "conspiracy" as follows:

a) An agreement; and,

b) To do something unlawful or to do something lawful in an unlawful way.

2. Criminal Jury Instructions

The elements of conspiracy are listed in CJI2d 10.1 and paraphrased below as follows:

a) The defendant and someone else knowingly agreed to commit [state crime];

b) The defendant specifically intended to commit or help commit that crime; and,

c) The agreement took place or continued during a time period from [state time] to [state time].

d) The crime of [state crime] is defined as follows [recite elements]:

3. Common Attributes of Conspiracy

The Michigan Supreme Court made the following comments about conspiracy in *People v Carter*, 415 Mich 558, 567-570 (1982) and *People v Atley*, 392 Mich 298, 310-311 (1974):

- Conspiracy is an agreement or understanding, express or implied, between two or more persons to commit a criminal act or to accomplish a legal act by unlawful means.
- The gravamen of conspiracy is an agreement with another to commit a crime.
- Direct proof of agreement is not required, nor is it necessary that a formal agreement be proven. It is sufficient that the circumstances, acts, and conduct of the parties establish an agreement in fact.
- Conspiracy is complete upon formation of the agreement, and no overt act in furtherance of the conspiracy is necessary.
- A conspirator's guilt or innocence does not depend upon the accomplishment of the goals of the conspiracy.
- A defendant may be convicted and punished for both conspiracy and the underlying crime.

- Conspiracy is prosecuted as a separate offense because its dangers are not confined to the target offense. Conspiracy recognizes the increased and special danger to society presented by a group of persons acting in concert. Such concerted action increases the likelihood that the criminal object will succeed and decreases the possibility that the conspirators will depart from their criminal designs. Group association facilitates the attainment of more complex criminal purposes than could be achieved by individual actors.

C. Penalties

In the context of criminal sexual conduct or other sex-related crimes, MCL 750.157a provides two penalties for conspiracy offenses:*

*Other penalties are delineated for illegal gambling and wagering, and for legal acts committed in an illegal manner.

1) If the target offense is punishable by imprisonment for one year or more, the penalty for conspiracy shall be the same as that imposed for the target offense. Additionally, the court may in its discretion impose a $10,000 fine.

2) If the target offense is punishable by imprisonment for less than one year, the penalty for conspiracy shall be imprisonment for not more than one year or a maximum $1,000.00 fine, or both.

D. Sex Offender Registration

A conspiracy to commit a "listed offense" is defined as a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

E. Pertinent Case Law

1. Specific Intent Crime

Conspiracy is a specific intent crime, requiring both the intent to combine with others and the intent to accomplish the illegal objective. *People v Blume*, 443 Mich 476, 481 (1993).

2. Knowledge of All Conspirators or Conspiracy's Ramifications Not Necessary

A conspirator need not have knowledge of all the people involved in the conspiracy or the conspiracy's ramifications; instead, a conspirator need only have knowledge of the general object of the conspiracy. *People v Meredith (On Remand)*, 209 Mich App 403, 412 (1995), quoting *People v Cooper*, 326 Mich 514, 521 (1950), aff'd on rehearing 328 Mich 159 (1950).

3. Withdrawal From Conspiracy

A withdrawal from the conspiracy must be accompanied by some act to "prevent further criminal activity in furtherance of the conspiracy." *People v Hintz*, 69 Mich App 207, 222 (1976).

4. Inconsistent Verdicts Between Conspirators

Prosecuting multiple conspirators for one conspiracy may produce inconsistent verdicts—i.e., the factfinder may acquit some conspirators but convict others. To solve this issue, appellate courts have drawn distinctions between defendants jointly tried before the same factfinder, be it judge or jury, and those tried before different factfinders. A guilty verdict of one conspirator may not stand when the other conspirators were acquitted of the conspiracy by the same factfinder. *People v Alexander*, 35 Mich App 281 (1971). Compare, however, *People v Williams*, 240 Mich App 316, 329-331 (2000), where defendant's conviction for conspiracy to possess with intent to deliver more than 650 grams of cocaine was not inconsistent with the codefendant's conviction for the lesser offense of conspiracy to possess with intent to deliver more than 225 but less than 650 grams of cocaine, because defendant and codefendant conspired together "and with others."

A guilty verdict of one conspirator may stand when the other conspirators were acquitted in a joint trial by different factfinders. See *People v Cummins*, 139 Mich App 286, 292-295 (1984); and *People v Jemison*, 187 Mich App 90, 93-94 (1991).

3.9 Crime Against Nature (Sodomy/Bestiality)

Michigan's "Crime Against Nature or Sodomy" statute proscribes conduct commonly known as "sodomy" and "bestiality." Although those two terms do not appear in the statute, the phrase "crime against nature" does appear, and at common law a "crime against nature" embraced both sodomy and bestiality. *People v Carrier*, 74 Mich App 161, 165 (1977).

A. Statutory Authority

MCL 750.158 provides:

> "Any person who shall commit the abominable and detestable crime against nature either with mankind or with any animal shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."*

*See Section 3.27(B) for a definition of "sexually delinquent person."

1. Sodomy

*See Section 2.5(W) for information on anal intercourse and fellatio.

Sodomy is defined at common law as "carnal copulation between human beings in an unnatural manner." *People v Askar*, 8 Mich App 95, 99 (1967). Michigan follows the common law definition of sodomy. *People v Dexter*, 6 Mich App 247, 250 (1967). Sodomy only covers copulation by anal intercourse and does not, unlike some jurisdictions, include an act of fellatio. *Id*.*

MCL 750.159 specifies the requirements for sexual penetration in sodomy cases:

> "In any prosecution for sodomy, it shall not be necessary to prove emission, and any sexual penetration, however slight, shall be deemed sufficient to complete the crime specified in the next preceding section."

For a jury instruction on sodomy, see CJI2d 20.32, which states that a prosecutor must prove "the defendant voluntarily engaged in anal intercourse with another person. Anal intercourse is defined as a man penetrating the anus of another person with his penis. Any entry into the anus, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated."

*See Sections 2.2 and 2.5(W).

Although CJI2d 20.32 limits the crime of sodomy to *voluntary* anal intercourse, no such limitation appears in the statute or in the case law interpreting the statute. In fact, numerous appellate opinions have dealt with forcible sodomy. See, e.g., *People v Zinn*, 63 Mich App 204, 206-207 (1975); *People v Bratton*, 46 Mich App 1, 2 (1973); and *People v Ford*, 28 Mich App 547, 548 (1970). However, these cases involved offenses occurring before the enactment of the CSC Act, which now punishes forcible anal intercourse.*

The sodomy statute has been upheld over constitutional arguments that it is impermissibly vague, overbroad, and a denial of equal protection. *People v Coulter*, 94 Mich App 531, 535-538 (1980).

It is unlikely Michigan's sodomy law would withstand a substantive due process challenge to its constitutionality following the United States Supreme Court's decision in *Lawrence v Texas*, 539 US 558 (2003). The Court struck down a Texas statute prohibiting "deviate sexual conduct" between members of the same sex. 539 US at 579. In doing so, the Court reviewed and rejected its decision in *Bowers v Hardwick*, 478 US 186 (1986), in which the majority upheld the constitutionality of a Georgia statute similar to Michigan's statute. 539 US at 578.

At the time *Bowers* was decided, Georgia law, like Michigan's current statute, prohibited sodomy between same-sex *and* different-sex couples. The Texas law at issue in *Lawrence*, however, prohibited only members of the same sex from engaging in "deviate sexual conduct." The Court in *Lawrence* prefaced

its decision to overrule *Bowers* by stating that the laws at issue in both cases do more than prohibit a particular sexual act:

> "The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> * * *
>
> "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." 539 US at 567.

After conducting a comprehensive examination of relevant case law and treatises, the Court observed that a decision in *Lawrence* based on Equal Protection could be relatively ineffective. The Court reasoned that its decision in *Bowers* left open the possibility that Texas lawmakers would simply rephrase the prohibition against "deviate sexual conduct" to include such conduct between different-sex participants. The Court preempted this result by overruling *Bowers*:

> "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 539 US at 575.

2. Bestiality

Bestiality is any act of "sexual connection" between a human being and an animal; it is not limited to acts of anal intercourse or fellatio. *People v Carrier*, 74 Mich App 161, 166 (1977).

The Use Note accompanying CJI2d 20.32 states as follows:

> "If the defendant is charged with a sexual act with an animal, an instruction addressing that situation should be prepared."

B. Penalties

MCL 750.158 provides two penalties for "crime against nature" offenses:

1) Maximum imprisonment for not more than 15 years; or

2) If the defendant was a sexually delinquent person* at the time of the offense, imprisonment for an indeterminate term, 1 day to life.

*See Section 3.27(B) for a definition of "sexually delinquent person."

C. Sex Offender Registration

MCL 750.158 is a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

A defendant is not required to register under the Sex Offenders Registration Act (SORA) where the "abominable and detestable crime against nature" of which he was convicted under MCL 750.158 involved an animal, not a human being under the age of 18. *People v Haynes*, ___ Mich App ___, ___ (2008). An animal is not a victim for purposes of MCL 28.722(e)(*ii*), and therefore, a conviction for a violation of MCL 750.158 involving an animal is not a listed offense for purposes of SORA. *Haynes*, *supra* at ___.

3.10 Disorderly Person (Common Prostitute/Window Peeper/Indecent or Obscene Conduct)

A. Statutory Authority

A "disorderly person" is defined, in pertinent part, as any of the following:

- A common prostitute, MCL 750.167(1)(b).
- A window peeper, MCL 750.167(1)(c).
- A person engaged in indecent or obscene conduct in a public place, MCL 750.167(1)(f).

B. Penalties

Under MCL 750.168, a violation of MCL 750.167 is a misdemeanor punishable by not more than 90 days in jail or a maximum $500.00 fine, or both.*

*Regarding the punishment and fine, see MCL 750.504, Punishment of Misdemeanors When Not Fixed by Statute.

C. Sex Offender Registration

A third or subsequent violation of any combination of the following is a "listed offense" under the Sex Offenders Registration Act (SORA):

- Disorderly person—indecent or obscene conduct, MCL 750.167(1)(f).
- Indecent exposure, MCL 750.335a(2)(b); or
- A local ordinance substantially corresponding to MCL 750.167(1)(f) or MCL 750.335a.

A violation of MCL 750.335a(2)(b) if the person has previously been convicted of violating MCL 750.335a is a "listed offense" under SORA. MCL 28.722(e)(*iii*).

> **Note:** MCL 750.335a(2)(b) is a new violation added by 2005 PA 300, effective February 1, 2006. MCL 750.335a(2)(b) states: "If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both."

See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

A defendant's indecent exposure of his person to a 13-year-old neighbor girl on the front porch of his city dwelling is actionable under MCL 750.167 as indecent or obscene conduct in a "public place." *People v DeVine*, 271 Mich 635, 640 (1935). For current information on the definition of "public place," see *People v Brown (After Remand)*, 222 Mich App 586, 591 (1997); and *People v Vronko*, 228 Mich App 649, 657 (1998). See also Sections 3.15 "Gross Indecency," and 3.16 "Indecent Exposure."

A defendant's window peeping, by walking six feet off the sidewalk and placing one hand on the window sill and the other hand above his eyes while looking under a raised shade into a lighted room for two minutes, was actionable as "indecent, insulting, or immoral conduct or behavior" under a local disorderly person ordinance. *City of Grand Rapids v Williams*, 112 Mich 247, 248-249 (1897).

Case law interpreting the state disorderly conduct statute may be helpful in interpreting a local ordinance with identical language. *City of Westland v Okopski*, 208 Mich App 66, 74 (1994).

3.11 Dissemination of Sexually Explicit Matter to Minors

MCL 722.671 et seq. prohibits the dissemination/exhibiting and displaying of sexually explicit materials to minors. This legislation contains two main prohibitions:

- Disseminating sexually explicit material or exhibiting a sexually explicit performance to minors under age 18. This prohibition encompasses disseminating or exhibiting via the Internet or computer. MCL 722.675.
- Displaying sexually explicit matter to minors under age 18, who are unaccompanied by a parent or guardian, by a person possessing managerial responsibility for a business enterprise selling visual matter that depicts sexual intercourse or sadomasochistic abuse that is harmful to minors. MCL 722.677.

A. Statutory Authority—Disseminating and Exhibiting

A person is guilty of disseminating or exhibiting sexually explicit matter to a minor* under MCL 722.675(1) if that person does either of the following:

> "(a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
>
> "(b) Knowingly exhibits to a minor a sexually explicit performance that is harmful to minors."

*For purposes of this offense, a "minor" is a person under age 18. MCL 722.671(d).

3. 1.Mens Rea

"Knowingly disseminates" means that the person "knows both the nature of the matter and the status of the minor to whom the matter is disseminated." MCL 722.675(2).

A person knows the nature of the matter if the person is either "aware of its character and content" or "recklessly disregards circumstances suggesting its character and content." MCL 722.675(3).

A person knows the status of a minor if the person is "aware" that the minor is under 18 years of age or "recklessly disregards a substantial risk" that the minor is under 18. MCL 722.675(4).

4. 2.Statutory Exceptions

MCL 722.675 does not apply to the persons, entities, and occupations under MCL 722.676(a)-(f), which are listed as follows:

> "(a) A parent or guardian who disseminates sexually explicit matter to his or her child or ward unless the

dissemination is for the sexual gratification of the parent or guardian.

"(b) A teacher or administrator at a public or private elementary or secondary school that complies with the revised school code [MCL 380.1-380.1852], and who disseminates sexually explicit matter to a student as part of a school program permitted by law.

"(c) A licensed physician or licensed psychologist who disseminates sexually explicit matter in the treatment of a patient.

"(d) A librarian employed by a library of a public or private elementary or secondary school that complies with the revised school code, [MCL 380.1-380.1852], or employed by a public library, who disseminates sexually explicit matter in the course of that person's employment.

"(e) Any public or private college or university or any other person who disseminates sexually explicit matter for a legitimate medical, scientific, governmental, or judicial purpose.

"(f) A person who disseminates sexually explicit matter that is a public document, publication, record, or other material issued by a state, local, or federal official, department, board, commission, agency, or other governmental entity, or an accurate republication of such a public document, publication, record, or other material."

MCL 722.682a,* which also contains exceptions, states:

*Effective December 1, 2005. See 205 PA 108.

"This part does not apply to any of the following:

"(a) A medium of communication to the extent regulated by the federal communications commission.

"(b) An internet service provider or computer network service provider that is not selling the sexually explicit matter being communicated but that provides the medium for communication of the matter. As used in this section, 'internet service provider' means a person who provides a service that enables users to access content, information, electronic mail, or other services offered over the internet or a computer network.

> "(c) A person providing a subscription multichannel video service under terms of service that require the subscriber to meet both of the following conditions:
>
> "(*i*) The subscriber is not less than 18 years of age at the time of the subscription.
>
> "(*ii*) The subscriber proves that he or she is not less than 18 years of age through the use of a credit card, through the presentation of government-issued identification, or by other reasonable means of verifying the subscriber's age."

B. Statutory Authority—Displaying

*For purposes of this offense, a "minor" is a person under age 18. MCL 722.671(d).

A person is guilty of displaying sexually explicit matter to a minor* under MCL 722.677(1)(a)-(b) if that person:

- Possesses managerial responsibility for a business enterprise selling sexually explicit visual material that depicts sexual intercourse or sadomasochistic abuse and is harmful to minors; and
- Does either of the following:
  - knowingly permits a minor not accompanied by a parent or guardian to view that matter; or
  - displays that matter knowing its nature, unless the person does so in a restricted area.*

*See Section 3.11(C) for the definition of "restricted area."

5. 1.Mens Rea

"Knowingly permits" means that the person "knows both the nature of the matter and the status of the minor permitted to examine the matter." MCL 722.677(2).

A person knows the nature of the matter if the person is either "aware of its character and content" or "recklessly disregards circumstances suggesting its character and content." MCL 722.677(3).

A person knows the status of a minor if the person is "aware" that the minor is under 18 years of age or "recklessly disregards a substantial risk" that the minor is under 18. MCL 722.677(4).

C. Relevant Statutory Terms

"Display" means "to put or set out to view or to make visible." MCL 722.671(a).

"Disseminate" means "to sell, lend, give, exhibit, show, or allow to examine or to offer or agree to do the same." MCL 722.671(b).

"Exhibit" means to do one or more of the following:

> "(*i*) Present a performance.
>
> "(*ii*) Sell, give, or offer to agree to sell or give a ticket to a performance.
>
> "(*iii*) Admit a minor to premises where a performance is being presented or is about to be presented." MCL 722.671(c).

"Restricted area" means any of the following:

> "(*i*) An area where sexually explicit matter is displayed only in a manner that prevents public view of the lower 2/3 of the matter's cover or exterior.
>
> "(*ii*) A building, or a distinct and enclosed area or room within a building, if access by minors is prohibited, notice of the prohibition is prominently displayed, and access is monitored to prevent minors from entering.
>
> "(*iii*) An area with at least 75% of its perimeter surrounded by walls or solid, nontransparent dividers that are sufficiently high to prevent a minor in a nonrestricted area from viewing sexually explicit matter within the perimeter if the point of access provides prominent notice that access to minors is prohibited." MCL 722.671(e).

"Harmful to minors" means sexually explicit matter that meets all of the following criteria:

> "(*i*) Considered as a whole, it appeals to the prurient interest of minors as determined by contemporary local community standards.
>
> "(*ii*) It is patently offensive to contemporary local community standards of adults as to what is suitable for minors.
>
> "(*iii*) Considered as a whole, it lacks serious literary, artistic, political, educational, and scientific value for minors." MCL 722.674(a).

For definitions of "sexually explicit matter," "sexually explicit performance," "sexually explicit verbal material," and "sexually explicit visual material," see MCL 722.673.

D. Penalties

A violation of disseminating or exhibiting sexually explicit matter to a minor under MCL 722.675(1) is a felony punishable by imprisonment for not more than 2 years or maximum $10,000.00 fine, or both. MCL 722.675(5). When imposing the fine, the court shall consider the scope of defendant's commercial activity in disseminating sexually explicit matter to minors. *Id*.

A violation of displaying sexually explicit matter under MCL 722.677(1) is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $5,000.00 fine, or both. MCL 722.677(5).

> **Note:** In *Athenaco, Ltd v Cox*, 335 F Supp 2d 773, 787 (ED Mich, 2004), the Court upheld the January 1, 2004 amendments to MCL 722.671 et seq. The plaintiffs in that case challenged the constitutionality of the amendments. The Court held that the "Act, 2003 Mich. Public Act 192, M.C.L. §§ 722.671 (a), (b) and (e), 722.675 and 722.677 . . . is neither vague nor overbroad. As such, Defendants are entitled to summary judgment on the Act's constitutional validity."

E. Sex Offender Registration

Neither MCL 722.675 nor MCL 722.677 is specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

F. Pertinent Case Law

In *Athenaco, Ltd v Cox*, 335 F Supp 2d 773, 787 (ED Mich, 2004), the Court upheld the January 1, 2004 amendments to MCL 722.671 et seq. The plaintiffs in that case challenged the constitutionality of the amendments. The Court held that the "Act, 2003 Mich. Public Act 192, M.C.L. §§ 722.671 (a), (b) and (e), 722.675 and 722.677 . . . is neither vague nor overbroad. As such, Defendants are entitled to summary judgment on the Act's constitutional validity."

*1999 PA 33.

The U.S. District Court for the Eastern District of Michigan has found the 1999 amendments* to MCL 722.671 et seq., which added prohibitions against using computers or the Internet to disseminate sexually explicit materials to minors, to be unconstitutional under the U.S. Constitution's Commerce Clause and its First and Fourteenth Amendments. As a result, the District Court has permanently enjoined Michigan's Governor, Attorney General, and the State of Michigan from enforcing the amendments. *Cyberspace Communications, Inc v Engler*, 142 F Supp 2d 827 (ED Mich, 2001). The District Court's constitutional analysis of the amendments is found in a prior opinion, *Cyberspace Communications, In. v Engler*, 55 F Supp 2d 737, 753

(ED Mich, 1999), which granted plaintiffs' motion for preliminary injunction to enjoin enforcement of the amendments. The U.S. Court of Appeals for the 6th Circuit, in an unpublished opinion, *Cyberspace Communications, Inc v Engler*, 238 F3d 420 (CA 6, 2000), affirmed the granting of the preliminary injunction but remanded the cause for further proceedings, as the ultimate issues were premature and inappropriate for decision. The resulting District Court opinion permanently enjoined Michigan's Governor, Attorney General, and the State of Michigan from enforcing the amendments. See *Cyberspace*, 142 F Supp 2d 827.

Attempting to distribute obscene* matter via the Internet to a child who is actually an undercover police officer posing as a child is not barred by the doctrine of legal impossibility. *People v Thousand*, 465 Mich 149 (2001). For more information on the doctrine of impossibility, see Section 4.9.

*1999 PA 33 amended MCL 722.675 and replaced "obscene" with "sexually explicit."

3.12 Drug-Facilitated Criminal Sexual Conduct

This section addresses those provisions of the Controlled Substances Act that penalize drug-facilitated criminal sexual conduct and the manufacture, delivery, possession, or possession with intent to manufacture or deliver gamma-butyrolactone (GBL).*

*See Section 8.8 for more information on drug-facilitated sexual assaults.

The Michigan Legislature enacted MCL 333.7401a to specifically prohibit using a controlled substance or GBL to facilitate a criminal sexual conduct crime. GBL, an analogue of gamma-hydroxybutyrate (GHB), is expressly listed in MCL 333.7401a presumably because it is not a controlled substance under Michigan law. (See MCL 333.7104(3) for a definition of "controlled substance analogue.") Instead of making GBL a controlled substance, the Legislature enacted MCL 333.7401b, which punishes a person who manufactures, delivers, possesses, or possesses with the intent to manufacture or deliver GBL.* Both of these crimes are discussed below.

*The manufacture, delivery, and possession of controlled substances (and their analogues) is punishable under the general provisions of the Controlled Substances Act.

A. Delivery of a Controlled Substance or GBL to Commit Criminal Sexual Conduct in Violation of MCL 333.7401a

MCL 333.7401a punishes a person who, without the individual's consent, delivers or causes to be delivered a controlled substance or GBL to an individual to commit or attempt to commit the following crimes against the individual:

- First-degree criminal sexual conduct, MCL 750.520b.
- Second-degree criminal sexual conduct, MCL 750.520c.
- Third-degree criminal sexual conduct, MCL 750.520d.
- Fourth-degree criminal sexual conduct, MCL 750.520e.

- Assault with intent to commit criminal sexual conduct, MCL 750.520g.

1. Statutory Authority

MCL 333.7401a provides:

> "(1) A person who, without an individual's consent, delivers a controlled substance or a substance described in section 7401b [MCL 333.7401b] or causes a controlled substance or a substance described in section 7401b [MCL 333.7401b] to be delivered to that individual to commit or attempt to commit a violation of [the statutes governing CSC-I-IV and assault with intent to commit CSC] against that individual is guilty of a felony punishable by imprisonment for not more than 20 years.
>
> "(2) A conviction or sentence under this section does not prohibit a conviction or sentence for any other crime arising out of the same transaction.
>
> "(3) This section applies regardless of whether the person is convicted of a violation or attempted violation of [the statutes governing CSC-I-IV and assault with intent to commit CSC]."

2. Penalties

A violation of MCL 333.7401a is a felony punishable by imprisonment for not more than 20 years.

3. Sex Offender Registration

MCL 333.7401a is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

B. The Manufacture, Delivery, Possession, or Possession with Intent to Manufacture or Deliver GBL

MCL 333.7401b punishes a person who manufactures, delivers, possesses, or possesses with intent to manufacture or deliver, any material, compound, mixture, or preparation containing GBL.

1. Statutory Authority

MCL 333.7401b provides:

> "(1) A person shall not do any of the following:

> "(a) Manufacture, deliver, or possess with intent to manufacture or deliver gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone.
>
> "(b) Knowingly or intentionally possess gamma-butyrolactone or any material, compound, mixture, or preparation containing gamma-butyrolactone.

It is an affirmative defense under this statute if the person manufactures, delivers, possesses, or possesses with intent to manufacture or deliver GBL for use in a commercial application and not for human consumption. MCL 333.7401b(2).

2. Penalties

A violation of MCL 333.7401b(1)(a) for manufacturing, delivering, or possessing with intent to manufacture or deliver GBL is a felony punishable by imprisonment for not more than seven years or a maximum $5,000.00 fine, or both.

A violation of MCL 333.7401b(1)(b) for possessing GBL is a felony punishable by imprisonment for not more than two years or a maximum $2,000.00 fine, or both.

3. Sex Offender Registration

MCL 333.7401b is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

C. Controlled Substance Schedules

MCL 333.7104 defines a controlled substance for purposes of the Controlled Substances Act as:

> "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72."

MCL 333.7211-333.7220 set forth the five Schedules, which generally are arranged in order according to the harmful nature of the classified controlled substances, with Schedule 1 substances being the most harmful and Schedule 5 substances being the least harmful.

- **Schedule 1:** High potential for abuse; no accepted medical use in U.S.; lacks accepted safety for use in medical treatment.
  - Examples: LSD, GHB, MDMA (Ecstasy), marijuana, mescaline, psilocybin, and peyote. See MCL 333.7211; and 1979 AC, R 338.3101.

- Schedule 2: High potential for abuse; currently accepted in medical treatment in U.S. (or currently accepted in medical use with severe restrictions); abuse may lead to severe psychic or physical dependence.
  - Examples: Opium, morphine, and methadone. MCL 333.7213.
- Schedule 3: Potential for abuse less than in Schedules 1 and 2; currently accepted in medical treatment in U.S.; abuse may lead to moderate or low physical dependence or high psychological dependence.
  - Examples: Materials, compounds, mixtures, or preparations containing limited quantities of narcotic drugs such as codeine, morphine, or opium. MCL 333.7215.
- Schedule 4: Low potential for abuse relative to Schedule 3; currently accepted in medical treatment in U.S.; abuse may lead to limited physical dependence or psychological dependence relative to Schedule 3.
  - Examples: Certain listed stimulants and depressants. MCL 333.7217.
- **Schedule 5:** Low potential for abuse relative to Schedule 4; currently accepted in medical treatment in U.S.; abuse may lead to limited physical dependence or psychological dependence relative to Schedule 4, or incidence of abuse is such that substance should be dispensed by practioner.
  - Examples: Compounds, mixtures, or preparations containing small quantities of narcotic drugs, such as codeine, or opium. MCL 333.7219.

3.13 Enticing Female Under 16

MCL 750.13 proscribes the enticement or taking away of a female under 16 years old, without the consent of the female's parent, guardian, or other person having legal charge over the female, if done for one of four purposes: prostitution; concubinage; sexual intercourse; or marriage.*

*The conduct covered by this offense might also be actionable as accosting a child, solicitation, attempt to commit CSC, or pandering. See Sections 3.2, 3.29, 3.6, and 3.24, respectively.

A. Statutory Authority

MCL 750.13 provides:

> "Any person who shall take or entice away any female under the age of 16 years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, either for the purpose of prostitution, concubinage, sexual intercourse or marriage,

> shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."

The statutory terms "concubinage" and "prostitution"* have no common-law meaning, but are "intended to cover all cases of lewd intercourse." *People v Cummons*, 56 Mich 544, 545 (1885).

*For a definition of "prostitution," see Section 3.24.

B. Penalties

A violation of MCL 750.13 is a felony punishable by imprisonment in state prison for not more than 10 years.

C. Sex Offender Registration

MCL 750.13 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. Specific Intent Crime

Child enticement is a specific intent crime. It requires a prosecutor to prove not only the act of enticement but also the intent or "particular purpose" for the enticement—i.e., prostitution, concubinage, sexual intercourse, or marriage. *People v Fleming*, 267 Mich 584 (1934).

2. Construction of "Guardian" or "Other Person Having the Legal Charge"

The statute's reference to a "guardian" or "other person having the legal charge" over the child is broad and not limited to a child's "legal relation." *People v Carrier*, 46 Mich 442, 445-446 (1881) ("[The child enticement statute] plainly contemplates that there may be a legal charge in one who is neither parent nor guardian, but who under the facts of the case stands in the place of one or the other. It is the actual state of things and not the existence of a legal relation that the statute contemplates . . . . The protection was meant to be general . . . ."

3. Construction of "Enticing"

"Enticing" encompasses "direct" and "indirect" propositions of a child. *Id.* at 447.

3.14 Extortion

Michigan's extortion statute creates two types of extortion: threats of harm and threats to accuse another of a crime. See the Commentary to CJI2d 21.1. Extortion punishes coercive behavior directed against individuals, regardless of whether it interferes with the orderly administration of justice. *People v Peña*, 224 Mich App 650, 658 (1997).

Threats of extortion, if they coerce the victim to submit to a sexual penetration or contact, fall under the "force or coercion" provisions of the CSC Act (threats of extortion are specifically delineated as "force or coercion" under the CSC Act). See MCL 750.520b(1)(f)(iii) (CSC-I);* MCL 750.520e(1)(b)(iii) (CSC-IV); and Section 2.5(I).

*CSC-I's "force or coercion" provision also applies to CSC-II and III. See MCL 750.520c(1)(d)(ii), (f) and MCL 750.520d(1)(b).

A. Statutory Authority

MCL 750.213 provides:

> "Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars."

B. Elements of Offense

People v Fobb, 145 Mich App 786, 790 (1985) established the following elements for the crime of extortion:

1) An oral or written communication maliciously encompassing a threat.

2) The threat must be to:

   a) Accuse the person threatened of a crime or offense, the truth of such accusation being immaterial; or

   b) Injure the person or property of the person threatened; or

   c) Injure the mother, father, husband, wife or child of the person threatened.

3) The threat must be:

a) With intent to extort money or to obtain a pecuniary advantage to the threatener; or

b) To compel the person threatened to do, or refrain from doing, an act against his or her will.

See also CJI2d 21.1, Extortion—Threatening Injury; and CJI2d 21.2, Extortion—Accusation of Crime.

C. Penalty

A violation of MCL 750.213 is a felony punishable by imprisonment for not more than 20 years or a maximum $10,000.00 fine, or both.

D. Sex Offender Registration

MCL 750.213 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

E. Pertinent Case Law

1. "Threats"

The extortion statute covers threats to obtain pecuniary advantage and threats that result in the victim undertaking an action of serious consequence, such as refusing to report a defendant's sexual misconduct or refusing to testify. *People v Hubbard (After Remand)*, 217 Mich App 459, 485-486 (1996). See also *People v Peña*, 224 Mich App 650, 656-657 (1997) (threats of future harm to victim if she said anything to police is "of such consequence or seriousness" that extortion statute applies).

The extortion statute does not cover threats where the act required of the victim is minor with no serious consequences to the victim. *Hubbard*, *supra* at 486; see also *People v Fobb*, 145 Mich App 786, 792-93 (1985) (forcing the victim to write a note stating the victim had been spreading lies about the defendant is not actionable as extortion).

Extortion threats must be written or stated; gestures alone are insufficient. CJI2d 21.1(3).

2. "Immediate, Continuing, or Future Harm"

To convict a defendant of extortion arising out of the taking of property by threat of harm, a prosecutor must prove the existence of a threat of future harm. See *People v Krist*, 97 Mich App 669, 670-676 (1980); and *People v Hubbard*, *supra* at 485. To convict a defendant of extortion arising from an action or omission, the prosecutor must prove the existence of a threat of immediate, continuing, or future harm. *Peña*, *supra* at 656.

3. Double Jeopardy Concerns

*See Section 3.23.

A defendant's punishment for extortion and obstruction of justice* did not violate constitutional prohibitions against double jeopardy. *Peña*, *supra* at 657-658.

> **Note:** As of this Benchbook's publication date, no published Michigan appellate case has decided whether extortion and any of the criminal sexual conduct offenses violate the constitutional prohibition against double jeopardy.

3.15 Gross Indecency—Between Males, Between Females, and Between Members of the Opposite Sex

A. Statutory Authority and Penalties

There are three gross indecency statutory provisions, all of which are distinguished by the gender of the participants: (1) gross indecency between males; (2) gross indecency between females; and (3) gross indecency between members of the opposite sex. Under all three statutes, the general crime of gross indecency applies to a defendant who commits an act of gross indecency with at least one other person.

Each of the three provisions also contains language that proscribes procuring or attempting to procure the commission of an act of gross indecency by another person. Procuring or attempting to procure an act of gross indecency applies to a defendant who facilitates or attempts to facilitate an act of gross indecency by two other persons. *People v Masten*, 414 Mich 16, 18-20 (1982).

1. Gross Indecency Between Males

MCL 750.338 provides:

*See Section 3.27(B) for a definition of "sexually delinquent person."

> "Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person,* may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."

2. Gross Indecency Between Females

MCL 750.338a provides:

"Any female person who, in public or in private, commits or is a party to the commission of, or any person who procures or attempts to procure the commission by any female person of any act of gross indecency with another female person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person,* may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."

*See Section 3.27(B) for a definition of "sexually delinquent person."

3. Gross Indecency Between Members of the Opposite Sex

MCL 750.338b provides:

"Any male person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a female person shall be guilty of a felony, punishable as provided in this section. Any female person who, in public or in private, commits or is a party to the commission of any act of gross indecency with a male person shall be guilty of a felony punishable as provided in this section. Any person who procures or attempts to procure the commission of any act of gross indecency by and between any male person and any female person shall be guilty of a felony punishable as provided in this section. Any person convicted of a felony as provided in this section shall be punished by imprisonment in the state prison for not more than 5 years, or by a fine of not more than $2,500.00, or if such person was at the time of the said offense a sexually delinquent person,* may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."

*See Section 3.27(B) for a definition of "sexually delinquent person."

B. Elements of Offense

Note: In order to understand the elements of the crime of gross indecency, it is necessary to review CJI2d 20.31 and the appellate opinions that follow it.

The elements for all gross indecency offenses are listed under CJI2d 20.31 and paraphrased below as follows:

1) First, that the defendant engaged in a sexual act that involved sexual penetration;

*If the sexual act was committed in a public place, the court may also add that consent of the participants, or the acquiescence of any observer, is not a defense. See CJI2d 20.31's Use Note.

2) Second, that the sexual act was committed in a public place. A place is public when a member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act.*

The first element above, which indicates that a sexual act must involve some form of sexual penetration, is inconsistent with Michigan case law. In *People v Bono*, 249 Mich App 115 (2002), the Court of Appeals stated: "[T]here are no Michigan cases holding that there *must* be some penetration, fellatio, or cunnilingus to constitute gross indecency." *Id*. at 123. [Emphasis in original.] In *Bono*, the Court found that a mastubatory act between consenting adult males in a store restroom could be grossly indecent if on remand such facts were established. In support of its finding, the Court cited *People v Lynch*, 179 Mich App 63, 66-67 (1989), where it previously held that public mastubatory sexual acts constitute gross indecency, and also *People v Lino*, 447 Mich 567 (1994), where the Michigan Supreme Court held that masturbation in the presence of minors was sufficient to sustain a conviction for procuring or attempting to procure an act of gross indecency. Thus, in gross indecency cases involving masturbation, "the trial court will have to modify the standard jury instruction to comport with the alleged act of masturbation." *Bono*, *supra* at 124.

The second element above, which indicates that the sexual act must be committed in a public place, is inconsistent with the terms of the statute and the Michigan Supreme Court opinion in *Lino*, *supra*, which held that procuring or attempting to procure a minor to commit acts of gross indecency is actionable regardless of being committed in public.

C. Sex Offender Registration

MCL 750.338-750.338b are "listed offenses" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. No Single Definition of Gross Indecency Exists

Michigan case law currently provides no single definition of what constitutes gross indecency. In *People v Lino*, 447 Mich 567, 571 (1994), the Michigan Supreme Court rejected the "common sense of the community" standard formerly used in gross indecency cases. Since then, Michigan appellate courts have provided no workable definition of gross indecency. See *People v Jones*, 222 Mich App 595, 602 (1997) ("*Lino* leaves us with a definitive statement regarding how not to determine whether an act is grossly indecent, but without a definitive statement regarding which acts are grossly indecent.") Instead of creating a singular definition of gross indecency, appellate courts proceed on a case-by-case basis:

> "[W]e decline to craft judicially an all-encompassing definition of what is, or what is not, grossly indecent. Until the Legislature gives the courts of this state a workable definition of gross indecency, malleable enough to protect, without unlawfully infringing on, the rights of the public, we must decide case by case, as the Supreme Court did in *Lino*, whether an act is grossly indecent." *Id*.

> **Note:** For review of Michigan appellate case law that adopted and then abandoned the "common sense of the community" standard, see *People v Bono*, 249 Mich App 115, 119-122 (2002).

In applying gross indecency on a case-by-case basis, appellate courts have focused their inquiry on the determination of two issues: (1) the nature of the sexual act; and (2) where the act was performed, i.e., a public or private place. See, generally, *People v Brown (After Remand)*, 222 Mich App 586, 590 (1997).

2. Nature of the Sexual Act

To be actionable under Michigan's gross indecency statute, a person's behavior must involve some type of overt sexual activity. *People v Drake*, 246 Mich App 637, 642 (2001). An "overt" act is one that is "open and perceivable." *Id*. Although the act or activity must be "sexual in nature," it need not result in actual sexual penetration or sexual contact. *Id*. In determining whether certain activity is grossly indecent, or in determining whether the motivation for the behavior was sexual in nature, the trier of fact may take into account the totality of the circumstances. *Id*.; *People v Jones*, *supra* at 602-603.

In *Drake*, the defendant allegedly invited several minor girls to participate in a "contest" in which they were to beat him, spit on him (and his food), and provide him with urine, feces and used tampons. According to testimony at the preliminary examination, the defendant would eat the urine and feces, and the girls would beat him. The girls testified that they, and defendant, remained fully clothed. Other testimony established that the girls never saw defendant "sexually gratify" himself, and they never saw him engage in any overt sexual touching or contact. However, one of the girls testified that defendant told her he "got high off [of these activities] and he liked it." *Id*. at 639. The district court refused to bind over the defendant (on three counts of gross indecency) at the preliminary examination on the grounds that the activity did not involve an overt sexual act. The Court of Appeals concluded that the district court abused its discretion in failing to bind over defendant. The Court found that the alleged activity need not result in sexual contact and the trier of fact may infer the sexual nature of the activity from the circumstances:

> "[E]ven though the cases so far have all included overt sexual touching or contact of the type identified [sexual

> intercourse, oral sexual stimulation, masturbation, or the touching of another person's genital or anus], this does not mean that only such overt acts constitute grossly indecent behavior. Instead, the operative principle is that the activity be sexual in nature.
>
> "We believe that behavior can be considered sexual activity within the context of the gross indecency statute even if it does not involve sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person's genitals or anus. Experience has shown that people can derive sexual gratification from a variety of acts, without ever engaging in any of the mentioned activities. For example, an individual might be sexually aroused or gratified by sexual masochistic behaviors, such as being humiliated and beaten. . . . The motivation for the behavior can be inferred from the totality of the circumstances and should be considered case by case. . . . [T]he sexual nature of the activity can be inferred even in the absence of [sexual intercourse, oral sexual stimulation, masturbation, or the touching of another person's genitals]." *Id*. at 642-643.

Based on the foregoing, the Court of Appeals in *Drake* held that testimony indicating that defendant "got high" from the activity and "liked it" was sufficient to infer the sexual nature of the alleged activity and thus sufficient to bind over defendant for trial. *Id*. at 643.

3. "Public" or "Private" Place

Although the statutory language of the gross indecency statute expressly includes conduct committed in either a "public" or "private" place, Michigan appellate courts have impliedly held that some conduct, such as oral sexual conduct between adults and consensual sexual intercourse between a husband and wife, cannot be actionable under MCL 750.338 when committed in a "private place." See, e.g., *Brown (After Remand)*, *supra* at 591-593; and *Jones*, *supra* at 604. However, in other cases, conduct such as mastubatory acts involving minors is actionable in either a "public" or "private" place. See, e.g., *Lino*, *supra*, in which the Supreme Court upheld a gross indecency conviction where the indecent mastubatory conduct involving minors occurred in a private place. Thus, depending upon the factual circumstances of the case, a trial court may have to determine what is a "private" or "public" place.

An act is committed in a "public place" when "an unsuspecting member of the public, who is in a place the public is generally invited or allowed to be, could have been exposed to or viewed the act." *Brown (After Remand)*, *supra* at 592.

A rented hotel or motel room is not a "public place." See *People v Favreau*, 255 Mich App 32 (2003), where the Court of Appeals reversed defendant's disorderly conduct conviction under MCL 750.167(1)(e), because defendant created the objectionable noise from within his hotel room, which, under *Lino*, *supra*, is not a "public place": "[E]ven if *Lino* stands for the proposition that 'public place' is generally given a broad definition, it also clearly stands for the proposition that a hotel or motel room is not a public place." *Favreau*, at 36. In so doing, the Court expressly rejected as insufficient the prosecutor's argument that defendant created noise that spilled into a public place. *Id*. at 36–37.

A "public place" may include an attorney interview room in a county jail if the interior of the room is visible to others having access to the area. See *People v Williams*, 237 Mich App 413, 417 (1999), which applied the *Brown (After Remand)* definition of "public place," and which emphasized the word "possibility" when referring to the likelihood of unsuspecting members of the public being exposed to, or viewing, an indecent act.

Determining whether a gross indecency crime was committed in a "public place" is a question of fact. See *People v Williams*, 462 Mich 861 (2000), in which the Supreme Court, in lieu of granting leave to appeal, vacated that portion of the Court of Appeals' opinion that stated "the interview room was a public place 'as a matter of law.'"

A person's grossly indecent act need not be witnessed by another person to constitute the crime of gross indecency. It is enough that the exposure occur in a public place under circumstances in which another person might reasonably have been expected to observe it. *Brown (After Remand)*, *supra* at 591. See also *People v Vronko*, 228 Mich App 649, 656-657 (1998), a case decided under the indecent exposure statute, MCL 750.335a,* but which also relied on *Brown (After Remand)*, *supra*.

*See also Section 3.16 for information on the crime of indecent exposure.

4. Appellate Court Determinations of Gross Indecency

The following cases illustrate situations in which Michigan appellate courts have determined that the conduct at issue constitutes (or may constitute) gross indecency:

- People v Bono, 249 Mich App 115 (2002) (male-male masturbation between stalls of a store restroom may be grossly indecent if on remand facts are established as such).
- People v Drake, 246 Mich App 637 (2001) (adult male's liking and getting "high off" of minor girls who allegedly beat him, spit on him and his food, and provided him with urine, feces, and used tampons was sufficient to constitute the crime of gross indecency).
- *People v Lino*, 447 Mich 567 (1994) (male-male oral sex in car in overflow parking lot of restaurant was grossly indecent).

- *People v Brashier*, 447 Mich 567 (1994) (procuring or attempting to procure a person under the age of consent to vomit, urinate, and pour syrup on another person in a hotel room while the person masturbates and is forced to consume the vomit, urine, and syrup was grossly indecent, regardless of being performed in public).

- *People v Brown (After Remand)*, 222 Mich App 586 (1997) (female-female oral sex in closed room of massage parlor may be grossly indecent if on remand facts establish room is "public place").

- *People v Jones*, 222 Mich App 595 (1997) (consensual sexual intercourse between husband and wife in public visiting room will be grossly indecent, if on remand these facts are established).

- *People v Kalchik*, 160 Mich App 40 (1987)* (male-male oral sex and manual sex under partitions in public restroom was grossly indecent, even though defendant's conviction was reversed and remanded on other grounds).

*Cited with approval in *Lino*, *supra* at 576.

- *People v Lynch*, 179 Mich App 63, 66-67 (1989)* (mutual masterbation between males in stall of highway restroom was "ultimate sex act" and grossly indecent).

*Cited with approval in *Bono*, *supra* at 120-122.

3.16 Human Trafficking

"Human trafficking" crimes include a number of separate offenses penalizing specific conduct involved in crimes related to forced labor or services. This section contains the statutory authority, necessary definitions, and penalties applicable to each of the human trafficking crimes.

E. A.Human Trafficking Crimes Involving Forced Labor or Services

5. 1.Physical Harm

– Knowingly subjecting or attempting to subject another person to forced labor or services **by causing or threatening to cause physical harm** is a felony punishable by not more than 10 years of imprisonment. MCL 750.462b(1).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462b(2).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462b(3).

6. 2.Physical Restraint

– Knowingly subjecting or attempting to subject another person to forced labor or services **by physically restraining or threatening to physically restrain** another person is a felony punishable by not more than 10 years of imprisonment. MCL 750.462c(1).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462c(2).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462c(3).

7. 3.Abuse of the Legal Process

– Knowingly subjecting or attempting to subject another person to forced labor or services **by abusing or threatening to abuse the law or legal process** is a felony punishable by not more than 10 years of imprisonment. MCL 750.462d(1).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462d(2).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462d(3).

8. 4.Interference with Passport/Immigration/Identification

– Knowingly subjecting or attempting to subject another person to forced labor or services **by knowingly destroying, concealing, removing, confiscating, or possessing an actual or purported passport or other immigration document, or any other actual or purported government identification document** is a felony punishable by not more than 10 years of imprisonment. MCL 750.462e(1).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462e(2).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462e(3).

9. 5.Blackmail or Financial Harm/Control

– Knowingly subjecting or attempting to subject another person to forced labor or services **by using blackmail, using or**

threatening to cause financial harm to, or exerting or threatening to exert financial control over another person is a felony punishable by not more than 10 years of imprisonment. MCL 750.462f(1).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462f(2).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462f(3).

10. 6.Recruiting, etc. Knowing or Intending the Result

– A person who knowingly or intentionally **recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means** another person for the purpose of forced labor or services is guilty of a felony punishable by not more than 10 years of imprisonment. MCL 750.462h(1)(a), (2).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462h(3).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462h(4).

11. 7.Financial Benefit

– A person who **benefits financially or receives anything of value from participating in a venture engaged in conduct prohibited under the human trafficking chapter** is guilty of a felony punishable by not more than 10 years of imprisonment. MCL 750.462h(1)(b), (2).

– If violation of the statute causes injury to another person, the offender is guilty of a felony punishable by not more than 15 years of imprisonment. MCL 750.462h(3).

– If another person's death is caused by violation of the statute, the offender *must* be sentenced to prison for life or any term of years. MCL 750.462h(4).

F. B. Human Trafficking Crime Involving Child Sexually Abusive Activity

MCL 750.462g states:

"A person shall not knowingly recruit, entice, harbor, transport, provide, or obtain by any means, or attempt to recruit, entice, harbor, provide, or obtain by any means, a minor knowing that the minor will be used for child sexually abusive activity. A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years."

G. C.Human Trafficking Crimes Involving Other Crimes

MCL 750.462i states:

"If a violation of this chapter involves kidnapping or an attempt to kidnap, criminal sexual conduct or an attempt to commit criminal sexual conduct, or an attempt to kill, the defendant shall be imprisoned for life or any term of years."

H. D.Definition of Terms Used in the Human Trafficking Chapter

- **"Child sexually abusive activity"** means "a child engaging in a listed sexual act" as defined in MCL 750.145c. MCL 750.462a(a). See Section 3.7 for more information.
- **"Commercial sexual activity"** means "[a]n act of sexual penetration or sexual contact as those terms are defined in [MCL 750.]520a for which anything of value is given or received by any person" or any conduct prohibited under MCL 750.145c(2) or (3) (creation, production, distribution, promotion, etc. of child sexually abusive material). MCL 750.462a(b). See Section 3.7(A) for information on child sexually abusive material, and Section 2.5 for more discussion of the terms "sexual penetration" and "sexual contact."
- **"Extortion"** means conduct prohibited under MCL 750.213, "including, but not limited to, a threat to expose any secret tending to subject a person to hatred, contempt, or ridicule." MCL 750.462a(c). See Section 3.14 for more information.
- **"Financial harm"** means criminal usury (MCL 438.41), extortion, employment contracts in violation of the wage and benefit provisions in MCL 408.471 to 408.490, or any other adverse financial consequence. MCL 750.462a(d).
- **"Forced labor or services"** means labor or services obtained or maintained by conduct described in at least one of the following provisions:
  - causing/threatening to cause serious physical harm to another person.

- physically restraining/threatening to physically restrain another person.
- abusing/threatening to abuse the law or legal process.
- knowingly destroying, concealing, removing, confiscating, or possessing another person's actual or purported passport or other immigration document, or any other government identification document.
- blackmail.
- causing/threatening to cause financial harm to any person. MCL 750.462a(e).

♦ **"Labor"** means work having economic or financial value. MCL 750.462a(f).

♦ **"Maintain,"** as it relates to labor or services, means "to secure continued performance of labor or services, regardless of any initial agreement on the part of the victim to perform the labor or services." MCL 750.462a(g).

♦ **"Minor"** means a person under the age of 18. MCL 750.462a(h).

♦ **"Obtain"** means securing the performance of labor or services. MCL 750.462a(i).

♦ **"Services"** means "an ongoing relationship between a person and another person in which the other person performs activities under the supervision of or for the benefit of the person, including, but not limited to, commercial sexual activity and sexually explicit performances." MCL 750.462a(j).

3.17 Indecent Exposure

A. Statutory Authority and Penalties

MCL 750.335a prohibits a person from knowingly making an open or indecent exposure of himself or herself or of another person. Specifically, MCL 750.335a states:

> "(1) A person shall not knowingly make any open or indecent exposure of his or her person or of the person of another.
>
> "(2) A person who violates subsection (1) is guilty of a crime, as follows:

> "(a) Except as provided in subdivision (b) or (c), the person is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
>
> "(b) If the person was fondling his or her genitals, pubic area, buttocks, or, if the person is female, breasts, while violating subsection (1), the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.
>
> "(c) If the person was at the time of the violation a sexually delinquent person,* the violation is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life."

*See Section 3.27(B) for a definition of "sexually delinquent person."

B. Elements of Offense

The elements of the offense are listed under CJI2d 20.33 and paraphrased below as follows:

1) First, the defendant exposed [his / her] [state body part].

2) Second, the defendant knew that [he / she] was exposing his or her [state body part].

> **Note:** Although MCL 750.335a makes the indecent exposure of another person a crime, CJI2d 20.33 only encompasses a defendant's indecent exposure of himself or herself. In appropriate cases, the jury instruction could be amended to address the defendant's exposure of the body part of another.

3) Third, the defendant did this in a public place under circumstances in which another person might reasonably have been expected to observe it.

4) Fourth, that the defendant did this on [date] at [place].

5) Fifth, if you find that the act was committed, you must decide whether the act was improper and indecent according to your community's standards of decency and morality.

C. Sex Offender Registration

A third or subsequent violation of any combination of the following is a "listed offense" under the Sex Offenders Registration Act (SORA):

- Indecent exposure, MCL 750.335a(2)(a);
- Disorderly person—indecent or obscene conduct, MCL 750.167(1)(f); or
- A local ordinance substantially corresponding to MCL 750.167(1)(f) or MCL 750.335a.

A violation of MCL 750.335a(2)(b) if the person has previously been convicted of violating MCL 750.335a is a "listed offense" under SORA. MCL 28.722(e)(*iii*).

See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. Construction of Terms

The conduct prohibited under the indecent exposure statute is not precisely defined. In construing the statute, appellate courts have resorted to the plain and ordinary meaning of the statute's terms by using dictionary definitions. In *People v Vronko*, 228 Mich App 649 (1998), the Court of Appeals defined the following terms in the indecent exposure statute as follows:

> "With respect to the common uses of the words contained in the statute, *Webster's New Collegiate Dictionary* (1977) defines 'open,' in part, as being 'exposed to general view or knowledge,' 'having no protective covering,' and 'to disclose or expose to view.' Likewise, the word 'exposure' is defined as meaning a 'disclosure to view' especially of 'a weakness or something shameful or criminal.' *Id*. 'Indecent' is defined as 'grossly unseemly or offensive to manners or morals.' *Id*. Finally, 'indecent exposure' is defined as being an 'intentional exposure of part of one's body (as the genitals) in a place where such exposure is likely to be an offense against the generally accepted standards of decency in a community.' [Citation omitted]." *Id*. at 653-654.

2. Statute Not Unconstitutionally Vague

The indecent exposure statute is not unconstitutionally vague and does not confer on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed. *Id*. at 654.

3. Indecent Act Need Not Be Witnessed

An indecent exposure need not be witnessed by another person to constitute an "open" exposure; the exposure need only be committed in a "public place" where another person might reasonably have been expected to observe it. In *Vronko*, the defendant was parked on a street in front of a house in a no-parking zone, with the passenger-side window open. A witness, standing in a doorway of a house above street-level, observed "something" in defendant's hand near his crotch. The witness never saw defendant's penis, but saw his hand "going like gangbusters." Defendant was wearing a long-sleeve shirt and his "legs were bare." Although the witness had "no doubt" defendant was masturbating, none of the school children walking on the sidewalk near the lowered passenger window reacted in any way to defendant's actions. On these facts, the Court of Appeals found sufficient evidence of defendant's penis being uncovered. *Id*. at 654-655. It also found that defendant's exposure of his penis, though not actually witnessed by another person, was sufficient to constitute "open or indecent exposure" because the exposure occurred in a public place under circumstances in which another person might reasonably have been expected to observe it. *Id*. at 656-657, relying on *People v Brown (After Remand)*, 222 Mich App 586, 591-592 (1997).

A rented hotel or motel room is not a "public place." See *People v Favreau*, 255 Mich App 32 (2003), where the Court of Appeals reversed defendant's disorderly conduct conviction under MCL 750.167(1)(e), because defendant created the objectionable noise from within his hotel room, which, under Lino, supra [People v Lino, 447 Mich 567 (1994)], is not a "public place": "[E]ven if Lino stands for the proposition that 'public place' is generally given a broad definition, it also clearly stands for the proposition that a hotel or motel room is not a public place." Favreau, at 36. In so doing, the Court expressly rejected as insufficient the prosecutor's argument that defendant created noise that spilled into a public place. Id. at 36–37.

4. Consenting Audience No Defense; First Amendment Concerns

On-stage acts of masturbation in front of a consenting audience are actionable under the indecent exposure statute. In *People v Wilson*, 95 Mich App 440, 443 (1980), the Court of Appeals reinstated an indecent exposure charge over defendant's First Amendment overbreadth challenge and her contention that consent bars prosecution for conduct that involved massaging "her pubic region" and spreading her buttocks to "expose her anus and vulva" while dancing before a consenting audience on a theatre stage.

5. 5.Person Exposed Cannot Also Be Person Offended

In a case of first impression, the Michigan Court of Appeals considered "[w]hether an 'open exposure' is effected if only the defendant witnesses the exposure . . . ." *People v Williams*, 256 Mich App 576, 580 (2003). In *Williams*, the defendant entered the bathroom at a private residence where his

8-year-old niece was bathing. *Williams, supra* at 577. The defendant refused his niece's request to leave the room, and he proceeded to draw a picture of the girl and included depictions of her vagina and breasts. *Williams, supra* at 577.

The district and circuit courts disagreed with the defendant that an "open or indecent exposure" could not occur in a private residence where all possible observers were also actors in the alleged criminal conduct. *Williams, supra* at 579–580. Citing *Vronko, supra*, the Michigan Court of Appeals recognized that an "open exposure" need not actually be witnessed by another person, provided the exposure occurred in a public place under circumstances in which it was reasonable to expect another person to observe it. *Williams, supra* at 583. Notwithstanding *Vronko*, the Court decided that the language of the indecent exposure statute and the cases interpreting it could not justify a finding "that the test for whether a punishable open exposure occurred is whether the *person being viewed* might have been offended by his or her own exposure." *Williams, supra* at 583 (emphasis in original).

6. 6.Indecent Act Televised

In *People v Huffman*, 266 Mich App354, 357 (2005), the defendant produced a television show with a three-minute segment showing a penis and testicles marked with facial features. A voice-over provided "purportedly humorous commentary as if on behalf of the character." *Id.* The defendant was charged with and convicted of indecent exposure. *Id*. at 358. On appeal, the defendant argued that MCL 750.335a cannot be properly construed to apply to televised images. *Id*. at 358–359. The Court of Appeals upheld the conviction, concluding that the purposes of the indecent exposure statute are "fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure." *Huffman, supra* at 360. The Court found that a televised exposure could be more shocking than a physical exposure because the persons subjected to it are in private homes. *Id*. Furthermore, the defendant's exposure on television was more likely a close up and lasted longer than a physical exposure. *Id* at 360–361.

The court also concluded that defendant's right to free speech was not violated by his conviction of indecent exposure. *Id.*, relying on *United States v O'Brien*, 391 US 367 (1968), *Barnes v Glen Theatre, Inc*, 501 US 560 (1991), and *City of Erie v Pap's AM*, 529 US 277 (2000).

7. Public Exposure Not Necessary

In *People v Neal*, 266 Mich App 654, 655 (2005), the defendant exposed his erect penis to a minor female guest inside a bedroom in his home. After the jury returned a verdict of guilty, the defendant moved for a directed verdict, arguing that in order to be convicted of indecent exposure pursuant to MCL 750.335a, the exposure must take place in a public place. The trial court granted the defendant's motion for directed verdict and dismissed the charge. On appeal, the Court of Appeals overturned the trial court's finding and

reinstated the defendant's conviction. MCL 750.335a prohibits "open" *or* "indecent" exposures that are knowingly made. MCL 750.335a does not require that "indecent" exposures only occur in a public place. Further, the Court found that case law does not require public exposure. The Court concluded that a trial court should not focus on the location of an indecent exposure but upon "the act of intentionally exposing oneself to others who would be expected to be shocked by the display." The Court concluded:

> "Here, defendant's exposure clearly falls within the definition of an 'open' exposure, whereas the victim would have reasonably been expected to observe it and, she might reasonably have been expected to have been offended by what was seen. . . . Additionally, defendant's conduct also falls under the definition of 'indecent' exposure. Defendant . . . made a knowing and intentional exposure of part of his body (his genitals) to a minor child in a place (a house) where such exposure is likely to be an offense against generally accepted standards of decency in a community. . . . It was not necessary that the exposure occur in a public place because there was in fact a witness to the exposure itself.[4] Thus, defendant's exposure could be properly categorized not only as an 'open' exposure, but also as an 'indecent' exposure for purposes of MCL 750.335a.
>
> ---
>
> "[4] In light of our conclusion, the Standing Committee on Standard Criminal Jury Instructions may want to review CJI2d 20.33(4)." *Neal, supra* at 663–664.

3.18 Inducing a Minor to Commit a Felony

The inducement statute, MCL 750.157c, was enacted to "prohibit adults from taking advantage of minors to further the adults' own felonious activities."* The statute punishes a person 17 or older who "recruits, induces, solicits, or coerces" a minor under 17 to commit or attempt to commit a felony.

*See *People v Pfaffle*, 246 Mich App 282, 300 (2001).

A. Statutory Authority

MCL 750.157c provides:

> "A person 17 years of age or older who recruits, induces, solicits, or coerces a minor less than 17 years of age to commit or attempt to commit an act that would be a felony if committed by an adult is guilty of a felony and shall be punished by imprisonment for not more than the maximum

term of imprisonment authorized by law for that act. The person may also be punished by a fine of not more than 3 times the amount of the fine authorized by law for that act."

B. Penalties

MCL 750.157c states that a person "shall be punished by imprisonment for not more than the maximum term of imprisonment authorized by law for that act [the act that would be a felony]." Therefore, a person will be subject to the maximum penalties of the target offense or offenses. Additionally, the statute allows for a fine of not more than three times the amount of the fine authorized by the target offense or offenses. If the target offense or offenses are silent on imprisonment and fines, see MCL 750.503, Punishment of Felonies When Not Fixed by Statute (Four years/$2,000.00); and MCL 750.504, Punishment of Misdemeanors When Not Fixed by Statute (90 days/$100.00).

C. Sex Offender Registration

MCL 750.157c is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on "listed offenses" and SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

Of the four different actions listed in the inducement statute—"recruits, induces, solicits, or coerces"—only the terms "induces" and "coerces" require a minor who is induced by an adult to commit or attempt to commit a felony. The other two terms, "recruits" and "solicits," do not require the minor to commit or attempt to commit a felony, since the crime is complete upon the recruitment or solicitation. *People v Pfaffle*, 246 Mich App 282, 299-300 (2001). The definition of "induce" means that the adult has essentially "persuaded" the minor "to bring about or cause" the felony. *Id*. at 299. The term "coerce" has an almost identical meaning, except that the adult uses "force or intimidation" to "bring about" the crime. The definitions of "recruit" and "solicit" emphasize the adult's conduct in "attracting a minor or asking a minor to commit or attempt to commit the felony." *Id*. at 299-300.

In *Pfaffle*, the defendant planned to rape and kill children. To help him effectuate these plans, he offered alcohol and cigarettes to a 15-year-old minor, who, despite taking the alcohol and cigarettes, never assisted the defendant with his plans. Defendant was convicted of two counts of inducing a minor to commit a felony (murder and CSC-I), and one count of CSC-IV (for fondling the minor's genitals). The Court of Appeals affirmed all three convictions. On the inducement convictions, after interpreting the words of the statute, the Court of Appeals found that defendant's actions in offering alcohol and cigarettes to the minor amounted to "recruitment" and "solicitation," and that the crime of inducement is complete upon the

recruitment and solicitation. This being the case, the minor did not have to commit or attempt to commit murder or CSC-I. *Id.* at 301.

3.19 Internet and Computer Solicitation

Michigan's Internet and computer solicitation crime, MCL 750.145d, prohibits the solicitation of both minor and adult victims by Internet or computer.

A. Statutory Authority

1. Minor Victims Only

MCL 750.145d(1)(a) punishes a person who uses the Internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under any of the following statutes, if the victim or intended victim is a minor or is believed by that person to be a minor:*

*For purposes of this statute, a "minor" is a person under 18. MCL 750.145d(9)(g).

- Accosting, enticing, soliciting a child, MCL 750.145a.
- Child sexually abusive activity, MCL 750.145c.
- Recruiting or inducing a minor to commit a felony, MCL 750.157c.
- Kidnapping, MCL 750.349.
- Kidnapping child under 14, MCL 750.350.
- Criminal sexual conduct—first degree, MCL 750.520b.
- Criminal sexual conduct—second degree, MCL 750.520c.
- Criminal sexual conduct—third degree, MCL 750.520d.
- Criminal sexual conduct—fourth degree, MCL 750.520e.
- Assault with intent to commit criminal sexual conduct, MCL 750.520g.
- Dissemination of sexually explicit matter to minor, MCL 722.675.

> **Note:** The U.S. District Court for the Eastern District of Michigan in *Cyberspace Communications, Inc v Engler*, 142 F Supp 2d 827 (ED Mich, 2001) found the Internet and computer provisions of MCL 722.675 (dissemination of sexually explicit matter to a minor) to be unconstitutional under the U.S. Constitution's First

*See Sections 3.11(F) and 3.18(F) for further discussion of the statute and case opinion.

and Fourteenth Amendments and Commerce Clause. As a result, the District Court permanently enjoined Michigan's Governor, Attorney General, and the State of Michigan from enforcing these provisions.* Accordingly, if a court finds the Internet and computer provisions of MCL 722.675 to be unconstitutional, it might nullify the use of this crime under this subsection of the Internet and computer solicitation statute, MCL 750.145d(1)(a).

2. Minor and Adult Victims

MCL 750.145d(1)(b)-(c) punishes a person who uses the Internet, a computer, computer program, computer network, or computer system to communicate with any person for the purpose of committing, attempting to commit, conspiring to commit, or soliciting another to commit the following offenses, without regard to the age of the intended victim:

- Stalking, MCL 750.411h.
- Aggravated stalking, MCL 750.411i.
- Conduct proscribed in chapter XXXIII of the Penal Code [governing explosives, bombs, and harmful devices, MCL 750.200 et seq].
- Death due to explosives, MCL 750.327.
- Sale of explosives to minors, MCL 750.327a.
- Death due to explosive with intent to destroy building, MCL 750.328.
- Filing false police report, MCL 750.411a(2).

B. Jurisdictional Concerns

A violation of any of the offenses listed in Section 3.18(A) may be prosecuted in any jurisdiction in which the communication originated or terminated. MCL 750.145d(7).

A violation or attempted violation of any of the offenses listed in Section 3.18(A) occurs if the communication originated in this state, is intended to terminate in this state, or is intended to terminate with a person who is in this state. MCL 750.145d(6).

Additionally, MCL 762.2(1)(a)-(e)* provide that a person may be prosecuted for a criminal offense while he or she is physically located within or outside this state if any of the following circumstances exist:

*MCL 762.2 was added by 2002 PA 129, effective April 22, 2002.

- The person commits a criminal offense wholly or partly within this state.

  Note: A criminal offense is considered to be committed "partly within this state" if any of the following apply:

  > "(a) An act constituting an element of the criminal offense is committed within this state.
  >
  > "(b) The result or consequences of an act constituting an element of the criminal offense occur within this state.
  >
  > "(c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed." MCL 762.2(2)(a)-(c).

- The person's conduct constitutes an attempt to commit a criminal offense within this state.

- The person's conduct constitutes a conspiracy to commit a criminal offense within this state and an act in furtherance of the conspiracy is committed within this state by the offender, or at his or her instigation, or by another member of the conspiracy.

- A victim of the offense or an employee or agent of a governmental unit posing as a victim resides in this state or is located in this state at the time the criminal offense is committed.

- The criminal offense produces substantial and detrimental effects within this state.

A person may be charged, convicted, or punished for any violation of law committed while violating or attempting to violate any of the offenses listed in Section 3.18(A), including the underlying offense. MCL 750.145d(4).

A person may be prosecuted under MCL 750.145d(5) regardless of whether the person is convicted of committing, attempting to commit, conspiring to commit, or soliciting another to commit the underlying offense.

C. Relevant Statutory Terms

For definitions of relevant statutory terms, such as "computer," "computer network," "computer program," "computer system," "device," and "internet," see MCL 750.145d(9).

D. Penalties

MCL 750.145d(2) contains the following penalties for the foregoing offenses, regardless of the victim's age:

1) If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of less than one year, the person is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum $5,000.00 fine, or both. MCL 750.145d(2)(a).

2) If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of one year or more but less than two years, the person is guilty of a felony punishable by imprisonment for not more than two years or a maximum $5,000.00 fine, or both. MCL 750.145d(2)(b).

3) If the underlying crime is a misdemeanor or a felony with a maximum term of imprisonment of two years or more but less than four years, the person is guilty of a felony punishable by imprisonment for not more than four years or a maximum $5,000.00 fine, or both. MCL 750.145d(2)(c).

4) If the underlying crime is a felony with a maximum term of imprisonment of four years or more but less than 10 years, the person is guilty of a felony punishable by imprisonment for not more than 10 years or a maximum $5,000.00 fine, or both. MCL 750.145d(2)(d).

5) If the underlying crime is a felony with a maximum term of imprisonment of 10 years or more but less than 15 years, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a maximum $10,000.00 fine, or both. MCL 750.145d(2)(e).

6) If the underlying crime is a felony with a maximum term of imprisonment of 15 years or for life, the person is guilty of a felony punishable by imprisonment for not more than 20 years or a maximum $20,000.00 fine, or both. MCL 750.145d(2)(f).

A court may impose imprisonment under any of the foregoing offenses consecutively to any term of imprisonment for conviction of the underlying offense. MCL 750.145d(3).

A court may order a person convicted of violating any of the foregoing offenses to reimburse the state or local unit of government for expenses incurred in relation to the violation in the same manner that expenses may be ordered to be reimbursed under MCL 769.1f.* MCL 750.145d(8).

*MCL 769.1f authorizes expenses for emergency response, and expenses for prosecuting the person.

E. Sex Offender Registration

MCL 750.145d is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). However, MCL 750.145d has been held to fall under the Act's "catch-all" provision, see MCL 28.722(d)(x), which states that "[a]ny other violation of a law of this state . . . that by its nature constitutes a sexual offense against an individual who is less than 18 years of age" constitutes a "listed offense." *People v Meyers*, 250 Mich App 637, 650 (2002). For more information on SORA's "catch-all" provision (and its requirements), see Section 11.2(A)(2). For more information on SORA's registration and public notification requirements generally, see Section 11.2.

F. Pertinent Case Law

A defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor* in an effort to arrange a meeting at which the defendant expects the "minor" to fellate him may be bound over for trial for allegedly violating MCL 750.145d(1)(a) by attempting to engage in conduct prohibited by MCL 750.520d(1)(a)—third-degree criminal sexual conduct. *People v Cervi*, 270 Mich App 603, 619 (2006). Similarly, a defendant who uses a computer or the Internet to communicate with an individual the defendant believes to be a minor in an effort to arrange a meeting at which the defendant is to videotape the sexual activity that occurs between him and the "minor" may be bound over for trial for allegedly violating MCL 750.145d(1)(a) by attempting to engage in conduct prohibited by MCL 750.145c(2). *Cervi, supra* at 625.

*In this case, the minor was an undercover deputy sheriff posing as a minor.

In *Cervi*, the defendant met the "minor" through an instant-messaging service on the Internet. After the first contact, the defendant repeatedly contacted the "minor" and discussed meeting each other and the sexual conduct that would occur when they met. The defendant's communication with the "minor" constituted an attempt to commit third-degree criminal sexual conduct, an offense that triggers application of MCL 750.145d(1)(a) when the intended victim is a minor or the defendant believes the intended victim is a minor. *Cervi, supra* at 617. The Court further concluded that the defendant was properly charged with separate counts of violating MCL 750.145d(1)(a) for each time the defendant communicated on the Internet with the "minor" for the purpose of arranging a meeting to engage the "minor" in conduct prohibited by MCL 750.520d(1)(a). *Cervi, supra* at 617. Specifically, the Court stated:

> "[T]he prosecution properly can charge defendant under subsection 145d(1)(a) for each instance in which defendant used a computer to communicate with a perceived minor with the specific intent to engage in sexual penetration with someone he believed was between 13 and 16 years of age." *Cervi, supra* at 617.

In response to the defendant's request, the "minor" agreed to let the defendant videotape the sexual contact that was to take place when they met. According to the *Cervi* Court, these circumstances "support[] a reasonable inference that defendant communicated with [the "minor"] for the purpose of attempting, or with the specific intent to attempt, to arrange for, produce, or make 'child sexually abusive material.'" *Cervi, supra* at 625.

The defendant also contended that MCL 750.145d violated his right to free speech because it criminalized words alone. The *Cervi* Court disagreed and explained that MCL 750.145d "criminalizes communication with a minor or perceived minor with the specific intent to make that person the victim of one of the enumerated crimes." *Cervi, supra* at 605–606. The Court elaborated:

> "[T]he content of defendant's speech is more than mere words, because the content of the message combined with the sender's intent together comprise an invitation, and it is the act of issuing that invitation to a person the issuer believes is a child that is proscribed by law. However repugnant his words might be, the operative issue is not what defendant said, it is his act of saying them to a person he believed was a 14-year-old girl with the intent that she would accept his invitation to engage in a sexual encounter." *Cervi, supra* at 620.

*The portions referred to are contained in 1999 PA 33. See also Section 3.11(F).

See also *People v Adkins*, 272 Mich App 37, 38 (2006), where the defendant was properly convicted of violating MCL 750.145d(1)(a) when he communicated via the Internet with a law enforcement officer posing as a minor. The conduct prohibited under MCL 750.145d(1)(a) includes conduct described as child sexually abusive activity, MCL 750.145c(2), for which mere preparation can support a conviction. In *Adkins*, the evidence established that the defendant's Internet communication with the perceived minor was in preparation for child sexually abusive activity. *Id*. at 47.

The U.S. District Court for the Eastern District of Michigan has found the Internet and computer portions* of Michigan's disseminating sexually explicit materials to minors crime, MCL 722.671 et seq., unconstitutional under the U.S. Constitution's First and Fourteenth Amendments. *Cyberspace Communications, Inc v Engler*, 55 F Supp 2d 737, 753 (ED Mich, 1999). As a result, the District Court has permanently enjoined Michigan's Governor, Attorney General, and the State of Michigan from enforcing these amendments. See *Cyberspace Communications, Inc v Engler*, 142 F Supp 2d 827 (ED Mich, 2001). Although both *Cyberspace* opinions were decided under a different statute, the rationale of the opinion may be used to attack the constitutionality of this Internet and computer solicitation crime. Both crimes contain identical Internet and computer terms and both crimes contain substantially similar jurisdictional provisions. However, both crimes are intended to cover distinct conduct: disseminating sexually explicit matter punishes the dissemination of the sexually explicit matter itself, whereas Internet and computer solicitation punishes conduct that involves committing,

attempting to commit, conspiring to commit, and soliciting another person to commit a select list of Michigan crimes.

3.20 Kidnapping

The crime of kidnapping, while sexually-neutral in title and substance, may be committed as a "precursor" crime to avoid detection and to facilitate a sexual assault—or it may be committed as a "wake" crime to exercise power and control over the victim and potential witnesses to keep them from reporting the crime or testifying in judicial proceedings.

Threats of kidnapping, if they coerce the victim to submit to a sexual penetration or contact, fall under the "force or coercion" provisions of the CSC Act (threats of kidnapping are specifically delineated as "force or coercion" under the CSC Act). See MCL 750.520b(1)(f)(iii) (CSC-I);* and MCL 750.520e(1)(b)(iii) (CSC-IV); and Section 2.5(I).

*CSC-I's "force or coercion" provision also applies to CSC-II and III by reference. See MCL 750.520c(1)(d)(ii), (f); and MCL 750.520d(1)(b).

A. Statutory Authority

MCL 750.349 provides:

> "(1) A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:
>
> > "(a) Hold that person for ransom or reward.
> >
> > "(b) Use that person as a shield or hostage.
> >
> > "(c) Engage in criminal sexual penetration or criminal sexual contact with that person.
> >
> > "(d) Take that person outside of this state.
> >
> > "(e) Hold that person in involuntary servitude.
>
> "(2) As used in this section, 'restrain' means to restrict a person's movements or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.
>
> "(3) A person who commits the crime of kidnapping is guilty of a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both.

"(4) This section does not prohibit the person from being charged with, convicted of, or sentenced for any other violation of law arising from the same transaction as the violation of this section."

B. Elements of Offense

Note: Effective August 24, 2006, 2006 PA 159 rewrote MCL 750.349 in its entirety. The statutory revision is likely to affect the applicability and content of the Criminal Jury Instructions discussed below.

The elements of kidnapping are listed in the following five criminal jury instructions:

- CJI2d 19.1—Kidnapping; Underlying Offense Other Than Murder or Crime Involving Murder
- CJI2d 19.2—Kidnapping; Underlying Offense of Murder or Crime Involving Murder, Extortion, or Taking a Hostage, or No Underlying Offense
- CJI2d 19.3—Kidnapping; Intent to Extort Money or Other Valuables
- CJI2d 19.4—Kidnapping; Secret Confinement of Victim
- CJI2d 19.5—Holding Victim for Labor or Services

The elements in the foregoing jury instructions are combined and paraphrased below as follows:

1) First, that [choose one of the following]:

   a) defendant forcibly confined or imprisoned the victim against his or her will. **(CJI2d 19.1, 19.2, 19.4, and 19.5)**

   b) the victim was forcibly seized, confined, or imprisoned. **(CJI2d 19.3)**

2) Second, that [choose one of the following]:

   a) defendant did not have legal authority to confine the victim **(CJI2d 19.1, 19.2, 19.4, and 19.5)**

   b) the victim was confined against his or her will. **(CJI2d 19.3)**

3) Third, that [choose one of the following]:

   a) while defendant was confining the victim, he or she forcibly moved or caused the victim to be moved from one place to another for the purpose of kidnapping. **(CJI2d 19.1)**

   b) while defendant was confining the victim, he or she forcibly moved or caused the victim to be moved from one place to another for the purpose of kidnapping or to murder the victim

or to get money or other valuables from the victim or to take the victim as a hostage. **(CJI2d 19.2)**

c) at the time the defendant intended to kidnap or confine the victim. **(CJI2d 19.3)**

d) defendant kept the victim's location secret. **(CJI2d 19.4)**

e) defendant acted willfully and maliciously. **(CJI2d 19.5)**

4) Fourth, that [choose one of the following]:

a) defendant intended to kidnap the victim. **(CJI2d 19.1)**

b) defendant intended to kidnap or confine the victim **(CJI2d 19.2)**

c) defendant kidnapped the victim with the intent of getting money or other valuables for the release of the victim. **(CJI2d 19.3)**

d) defendant intended the confinement to be secret. **(CJI2d 19.4)**

e) defendant intended to force or coerce the victim to perform labor or services. **(CJI2d 19.5)**

5) Fifth, that [choose one of the following]:

a) defendant acted willfully and maliciously. **(CJI2d 19.1, 19.2, 19.3, and 19.4)**

C. Penalties

A violation of MCL 750.349 is "a felony punishable by imprisonment for life or any term of years or a fine of not more than $50,000.00, or both." MCL 750.349(3). An offender convicted of kidnapping under MCL 750.349 may also be convicted of other offenses arising from the same transaction as the kidnapping violation. MCL 750.349(4).

The phrase "for life or for any term of years" requires the imposition of a fixed sentence of life imprisonment or an indeterminate sentence in state prison; incarceration in the county jail is not authorized, even if the imprisonment imposed is one year or less. *People v Austin*, 191 Mich App 468, 469-470 (1991). The phrase "for life or for any term of years" does not establish a mandatory minimum sentence. *People v Luke*, 115 Mich App 223 (1982), aff'd 417 Mich 430 (1983).

D. Sex Offender Registration

MCL 750.349 is a "listed offense" under the Sex Offenders Registration Act (SORA), if the victim is less than 18 years of age. See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

3.21 Lewd and Lascivious Cohabitation/Gross Lewdness

MCL 750.335 prohibits both lewd and lascivious cohabitation and gross lewdness.

A. Statutory Authority and Penalties

MCL 750.335 proscribes lewd and lascivious cohabitation and gross lewdness as follows:

> "Any man or woman, not being married to each other, who lewdly and lasciviously associates and cohabits together, and any man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00. No prosecution shall be commenced under this section after 1 year from the time of committing the offense."

B. Sex Offender Registration

MCL 750.335 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

C. Pertinent Case Law

1. Cohabitation Must Be "Lewd and Lascivious"

The Michigan Supreme Court has held that the lewd and lascivious statute does not prohibit cohabitation per se; cohabitants must also "lewdly and lasciviously associate." See *People v Davis*, 294 Mich 499 (1940) and *People v June*, 294 Mich 681 (1940) (two married couples who "swapped" their spouses and cohabitated together were not liable under MCL 750.335, despite their confessions of cohabitation, because the lewd and lascivious nature of their relationships had not been shown.) See also *McCready v Hoffius*, 459 Mich 131, 141 (1998), vacated in part on other grounds 459 Mich 1235 (1999) (finding insufficient evidence of an intent to engage in lewd and lascivious behavior, where defendant refused, on separate occasions, to rent residential property to two unmarried couples intent on cohabitating together as a couple).

2. Definition of "Lewdness"

The term "lewdness" is incapable of precise definition. In an opinion by Justice Riley, joined by Justices Boyle and Mallet, with Justice Griffin concurring only in the result, the Michigan Supreme Court defined "lewdness" in *Michigan ex rel Wayne Co Prosecutor v Bennis*, 447 Mich 719,

726 (1994) as being limited to actions occurring in furtherance of, or for the purpose of, prostitution:

> "[T]he common definition of 'lewdness' includes a lustful and obscene display of illicit sexual activity. Utilizing the common meaning of 'lewdness,' we also conclude that it is limited to those instances in which an act of lewdness occurs in furtherance of or for the purpose of prostitution."

In a subsequent case, a majority of the Supreme Court opined that "lewdness" includes "some sexual activities that stop just short of prostitution, as well as scandalous sexual exhibitions." In *Michigan ex rel Wayne Co Prosecutor v Dizzy Duck*, 449 Mich 353, 364 (1995) (*Dizzy Duck II*).

A case-by-case method should be used in determining what constitutes "lewdness," which is the same method used in determining what constitutes "gross indecency."* *Id*. at 364 n 13.

*See Section 3.15.

3. Retroactivity

The "lewdness" standard of *Dizzy Duck II* applies retroactively. *People v Mell*, 459 Mich 881 (1998).

3.22 Local Ordinances Governing Misdemeanor Sexual Assault

Sex offenders are sometimes convicted of sex offenses (and other related offenses) that were enacted as local misdemeanor ordinances by municipalities. "The Home City Rule Act," MCL 117.1a et seq., permits municipalities to adopt a state statute for which the maximum period of imprisonment is 93 days.* MCL 117.3(k).

*A city shall not enforce any provision adopted by reference, if the maximum period of imprisonment exceeds 93 days. MCL 117.3(k).

Local misdemeanor convictions present two areas of concern for trial courts: sex offender registration requirements and the availability of records pertaining to an accused's criminal history. Each area of concern is discussed below.

A. Sex Offender Registration

Not all sex-related ordinance violations enacted by a municipality are registerable under the Sex Offenders Registration Act (SORA). Only those local ordinances that by their nature constitute a "sexual offense" against a person "less than 18 years of age" are "listed offenses" under SORA. See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

B. Availability of Records and Setting Bond Conditions

Sexual assault crimes differ from many crimes in that its perpetrators exhibit a high recidivism rate. To adequately protect the public, it is important for a court to have complete information about the past behavior of the accused so it can make an accurate safety assessment and set appropriate bond conditions.

State Police records are a critical source for information about the past criminal behavior of an individual. These police records can be used for setting bond conditions under MCR 6.106 and for imposing enhanced sentences for repeat criminal conduct, as may be authorized by law.

*See Section 11.6 for more information on fingerprinting requirements.

Convictions for local ordinances may not appear in State Police records if they do not carry the 93-day penalty that triggers the fingerprinting requirements of MCL 28.243(1). Under this provision, a law enforcement agency *must* send the fingerprints to the State Police within 72 hours *after the arrest* of a person charged with a felony, a state law misdemeanor exceeding 92 days' imprisonment or a fine of $1,000.00 or both, criminal contempt for violating a personal protection order or foreign protection order, or a juvenile offense other than one for which the maximum penalty does not exceed 92 days' imprisonment or a fine of $1,000.00 or both.* However, law enforcement agencies are only required to take the fingerprints of a person arrested for a local ordinance when the local ordinance has a maximum possible penalty of 93 days' imprisonment and it substantially corresponds to a violation of state law that is a misdemeanor for which the maximum term of imprisonment is 93 days. MCL 28.243(2). Under MCL 28.243(2), the fingerprints in such circumstances are not required to be sent to the State Police within 72 hours after arrest, but only after the court forwards a copy of the disposition of conviction to the applicable law enforcement agency. The law enforcement agency must in turn forward the fingerprints to the State Police within 72 hours of receipt of the disposition of conviction. Thus, State Police records will be incomplete to the extent that local authorities do not have to fingerprint and report persons convicted of ordinance violations carrying a maximum 90-day jail term until after the persons have been convicted. In some jurisdictions, these gaps in state police records have permitted persons with previous convictions of sexual assault ordinance violations to avoid stricter bond conditions, thus unnecessarily endangering the victims and public.

Courts can correct the gaps in State Police records by working with local sexual assault coordinating councils to encourage reporting of local ordinance violations, and to remove barriers to reporting that exist in their communities.

3.23 Malicious Use of Phone Service

Perpetrators of sexual violence may try to frighten and intimidate victims and witnesses of a sexual assault by using a telephone or other communication device. This type of behavior, which can occur as a "precursor" crime to facilitate the sexual assault, or as a "wake" crime to exercise power and control over the victims and witnesses, may be actionable under the statute in this section. Additionally, such conduct, if it involves two or more malicious uses of a communications device, may be actionable under the stalking and aggravated stalking statutes.*

*See Section 3.30 for information on the crimes of stalking and aggravated stalking.

Note: Sexual assaults may involve the use of indecent or vulgar language. Michigan's indecent language statute, MCL 750.337, prohibits the use of such language when it occurs in the presence or hearing of a woman or child. However, the Court of Appeals recently held that MCL 750.337 was unconstitutional on vagueness grounds. *People v Boomer*, 250 Mich App 534, 542 (2002).

Additionally, the Court of Appeals has struck down as unconstitutionally vague (as applied to defendant) a local ordinance prohibiting persons from engaging in "any indecent, insulting, immoral or obscene conduct in any public place." In *People v Barton*, 253 Mich App 601 (2002), the defendant was convicted under the "insulting" term of the ordinance for referring to fellow restaurant patrons as "spics." The Court of Appeals, in reversing defendant's conviction, explained its rationale as follows:

> "Defendant was charged under the 'insulting' term of the ordinance. Even if the limiting construction of the ordinance remedied its failure to provide sufficient standards to determine whether a crime had been committed, the construction did not rehabilitate the ordinance with regard to its failure to provide fair notice to defendant of the conduct proscribed. Here, as noted by the *Boomer* Court, '[a]llowing a prosecution where one utters "insulting" language could possibly subject a vast percentage of the populace to a misdemeanor conviction.' Boomer, supra at 540. The term 'insulting' with regard to prohibited conduct did not give adequate forewarning that the challenged conduct—referencing a person by a racial slur—may rise to the level of constitutionally proscribable 'fighting words' conduct. In effect, without fair warning, defendant was charged with, and convicted for, conduct that she could not reasonably have known was criminal."

The Court of Appeals has also ruled unconstitutional (as applied to defendant) a local ordinance prohibiting persons from using "abusive or obscene" language "when such words by their very utterance inflict injury or tend to incite an immediate breach of the peace." In *People v Pouillon*, 254 Mich App 210 (2002), the defendant entered a conditional plea of no contest to this ordinance for yelling "[t]hey kill babies in that church . . . [w]hy are you

*MCL 771.2a(1) makes similar provision.

going in there?" to mothers who were dropping off their children at a day-care/pre-school operated by that church. Defendant's statements caused the children to be "visibly frightened and upset." He yelled these words while standing on city property, 30 feet away from a dentist's office and 300 feet away from the church. He chose that location because the church and the dentist had either previously celebrated the anniversary for Planned Parenthood or had publicly supported the organization. The Court of Appeals, in reversing defendant's conviction, and in finding that defendant's statements were not "fighting words," a category of words excluded from First Amendment protection, explained its rationale as follows:

> "In this case, defendant's words had no tendency to incite an imminent breach of the peace. Defendant's message was in the form of grotesque exaggeration that was more likely to frighten children than to impart information. However, the children's mere fright, though an unfortunate consequence of defendant's speech, did not rise to the level of violence or a disturbance of public order nor was such a result likely. If the purpose of the prohibition on 'fighting words' is to preserve public safety and order, then unprotected 'fighting words' do not encompass words that would emotionally upset children who are unlikely to retaliate. Therefore, based on the limited facts of this case, we find that the ordinance was unconstitutionally applied to defendant." *Id*. at 220–221.

A. Statutory Authority

MCL 750.540e provides:

> "(1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:
>
> > "(a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.
> >
> > "(b) Falsely and deliberately reporting by message through the use of a telecommunications service or device that a person has been injured, has suddenly taken ill, has suffered death, or has been the victim of a crime or an accident.
> >
> > "(c) Deliberately refusing or failing to disengage a connection between a telecommunications device and another telecommunications device or between

> a telecommunications device and other equipment provided for the transmission of messages through the use of a telecommunications service or device.
>
> "(d) Using vulgar, indecent, obscene, or offensive language or suggesting any lewd or lascivious act in the course of a conversation or message through the use of a telecommunications service or device.
>
> "(e) Repeatedly initiating a telephone call and, without speaking, deliberately hanging up or breaking the telephone connection as or after the telephone call is answered.
>
> * * *
>
> "(g) Deliberately engaging or causing to engage the use of a telecommunications service or device of another person in a repetitive manner that causes interruption in telecommunications service or prevents the person from utilizing his or her telecommunications service or device."

"A communication that either originates or terminates in this state is a violation of MCL 750.540e and may be prosecuted at the place of origination or termination." MCL 750.540e(2).

See MCL 750.540c for the definitions of "telecommunications," "telecommunications service," and "telecommunications device."

B. Penalties

A violation of MCL 750.540e is a misdemeanor punishable by imprisonment for not more than 6 months, or a maximum $1,000.00 fine or both. See MCL 750.540e(2).

C. Sex Offender Registration

MCL 750.540e is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. Specific Intent Crime

MCL 750.540e is a specific intent crime. In *People v Taravella*, 133 Mich App 515, 525 (1984), a case involving obscene or harassing phone calls, the Court of Appeals described the statute as follows:

> "[W]e find that the statute does not create two separate offenses, one requiring specific intent, the other not. Section (1) sets forth the conduct which is prohibited (the malicious use of a communications service with intent), while the following subsections enumerate the specific types of activities which, taken in conjunction with the basic requirements of (1), provide a basis for a criminal prosecution under the statute. Thus, one who acts with either the intent to annoy or terrorize or with the intent to disturb the peace and quiet of another and who *further* does one of the activities, listed in subsections (a) through (d) may be guilty of the misdemeanor offense of malicious use of service." *Id*. at 523. [Emphasis in original.]

The caller's malicious intent, not the listener's subjective perceptions of the nature of the call, establishes the criminality of the conduct. *Id*. at 521.

2. Constitutionality

MCL 750.540e is neither unconstitutionally vague nor overbroad. *Taravella*, *supra* at 521-522.

3.24 Obstruction of Justice

Perpetrators may try to dissuade or prevent victims and witnesses from reporting crimes and testifying in official proceedings. The crime of obstruction of justice punishes the interference with the orderly administration of justice. *People v Thomas*, 438 Mich 448, 455 (1991).

Effective March 28, 2001, the Michigan Legislature added two new statutory provisions governing obstruction of justice: MCL 750.483a, 2000 PA 451, which penalizes the interference with the reporting of crimes; and MCL 750.122, 2000 PA 452, which prohibits acts that discourage or prevent victims from testifying in official proceedings. These two statutes and their penalties are discussed in the next two subsections. The third subsection discusses common-law obstruction of justice and its penalties, for it is currently unclear whether the new obstruction of justice statutes abolish the "category of crimes" contained within common-law obstruction of justice.

A. "Reporting of Crimes" Statute and Penalties

1. Statutory Authority

MCL 750.483a punishes the interference with the reporting of crimes. Under MCL 750.483a(1)(b)-(c), it is unlawful to do any of the following:

> "(b) Prevent or attempt to prevent through the unlawful use of physical force another person from reporting a crime committed or attempted by another person.
>
> "(c) Retaliate or attempt to retaliate against another person for having reported or attempted to report a crime committed or attempted by another person. As used in this section, 'retaliate' means to do any of the following:
>
> > "(i) Commit or attempt to commit a crime against any person.
> >
> > "(ii) Threaten to kill or injure any person or threaten to cause property damage.

Under MCL 750.483a(3)(b), it is unlawful to do the following:

> "(b) Threaten or intimidate any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime."

MCL 750.483a(1)(b) does not require the prosecution to prove beyond a reasonable doubt that the crime being reported was committed or attempted by another person. *People v Holley*, 480 Mich 222, 224 (2008). The Supreme Court explained: "By including MCL 750.483a(1)(b) and its criminalization of the interference with the report of a crime within this statutory scheme, the Legislature has made clear that its concern was to prevent *interference* with the report of a crime and not with whether the crime being reported was actually committed or attempted." *Holley*, *supra* at 227. The Court found its conclusion to be harmonious with the grammatical construction of MCL 750.483a(1)(b), where "what is actually prevented or sought to be prevented is a report of a crime by another person and not 'a crime committed or attempted by another person.'" *Holley*, *supra* at 228, quoting MCL 750.483a(1)(b).

2. Affirmative Defenses

It is an affirmative defense to charges under MCL 750.483a(3) that the defendant's conduct was entirely lawful "and that the defendant's sole intention was to encourage, induce, or cause the other person to provide a statement or evidence truthfully." MCL 750.483a(7).

3. Penalties

A violation of these provisions constitutes a misdemeanor punishable by imprisonment for not more than one year or a maximum $1,000.00 fine, or both. A violation involving the commission or attempt to commit a crime against the person, or a threat to kill or injure the person or cause property

damage constitutes a felony punishable by imprisonment for not more than 10 years or a maximum $20,000.00 fine, or both. MCL 750.483a(2) and (4).

4. Sex Offender Registration

MCL 750.483a is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

B. "Testifying in Official Proceedings" Statute and Penalties

MCL 750.122 prohibits acts that discourage or prevent victims from testifying in official proceedings. "Official proceedings" include judicial proceedings and depositions conducted by prosecuting attorneys. MCL 750.122(12)(a). The proceeding need not take place and the victim or witness need not have been subpoenaed or ordered to appear in the proceeding. However, the defendant must know or have reason to know that the victim could be a witness at an official proceeding. MCL 750.122(9).

1. Statutory Authority

Under MCL 750.122(3), it is unlawful to do any of the following by threat or intimidation:

> "(a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> "(b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> "(c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding."

MCL 750.122(6) prohibits a person from willfully impeding, interfering with, obstructing, or attempting to impede, interfere with, or obstruct "the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding."

MCL 750.122(8) prohibits retaliating, attempting to retaliate, or threatening to retaliate against a person for having been a witness in a judicial proceeding. "Retaliate" means either of the following:

- committing or attempting to commit a crime against any person, or

– threatening to kill or injure any person or threatening to cause property damage. *Id.*

For a published Michigan Court of Appeals opinion on the statutory interpretation of the witness tampering statute in MCL 750.122, and specifically subsection 6 governing "interference," see *People v Greene*, 255 Mich App 426 (2003). In this case, the defendant, who was initially charged with killing an unborn quick child after assaulting his pregnant girlfriend, was later charged with witness tampering under MCL 750.122(6) for making a three-way telephone conversation from jail between himself, an acquaintance, and his girlfriend. During this conversation, defendant's girlfriend indicated that she had received a subpoena to appear at a hearing (presumably the preliminary examination) and was fearful of the consequences of failing to appear. Defendant, although not threatening or intimidating her, dismissed her fears, telling her not to come and "just stay gone until the court closes about 5:00." He also told her that failing to appear would only result in a $150.00 fine, and that the subpoena was ineffective. In concluding that the district court properly bound defendant over for trial, the Court of Appeals found that defendant's efforts through his three-way telephone conversation created a question of fact regarding whether his conduct fit the attempt language in MCL 750.122(6). *Id*. at 447–448. The Court also articulated the elements of "interference" under MCL 750.122(6) as follows:

> "[T]o prove that a defendant has violated MCL 750.122(6), . . . the prosecutor must prove that the defendant (1) committed or attempted to commit (2) an act that did not consist of bribery, threats or intimidation, or retaliation as defined in MCL 750.122 and applicable case law, (3) but was any act or attempt that was done willfully (4) to impede, interfere with, prevent, or obstruct (5) a witness's ability (6) to attend, testify, or provide information in or for a present or future official proceeding (7) having the knowledge or the reason to know that the person subjected to the interference could be a witness at any official proceeding. In the last part of the definition we use the word interference to include all types of conduct proscribed in subsection 6." *Id*. at 442–443.

2. Affirmative Defenses

It is an affirmative defense to charges under MCL 750.122(3) that the defendant's conduct was entirely lawful "and that the defendant's sole intention was to encourage, induce, or cause the other person to testify or provide evidence truthfully." MCL 750.122(4).

3. Penalties

Violations of MCL 750.122(3) and (6) subject the defendant to the following penalties:

a) except as provided below, a felony punishable by imprisonment for not more than four years or a maximum $5,000.00 fine, or both;

b) "[i]f the violation is committed in a criminal case for which the maximum term of imprisonment for the violation is more than 10 years, or the violation is punishable by imprisonment for life or any term of years," a felony punishable by imprisonment for not more than 10 years or a maximum $20,000.00 fine, or both;

c) "[i]f the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage . . . a felony punishable by imprisonment for not more than 15 years" or a maximum $25,000.00 fine, or both. MCL 750.122(7)(a)-(c).

A violation of MCL 750.122(8) is a felony punishable by imprisonment for not more than 10 years or a maximum $20,000.00 fine, or both. *Id.*

4. Sex Offender Registration

MCL 750.122 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

C. Common-law Obstruction of Justice

"Obstruction of justice" is also prohibited under the common-law. Common-law offenses may be abolished by statute. Const 1963, art 3, §7. It is unclear whether the enactment of the statutes detailed in the preceding two sections abolish common-law obstruction of justice. However, "where there is nothing in the language of a statute to the contrary, it is appropriate to give reference to established rules of common law in ascertaining the meaning of [a statute's] provisions." *J & L Investment Co, LLC v Dep't of Natural Resources,* 233 Mich 544, 549 (1999). Thus, when interpreting these recently enacted statutes, it may be proper to refer to the case law cited below on common-law obstruction of justice.

Regarding the interplay between statutory and common-law obstruction of justice, see *People v Greene*, 255 Mich App 426 (2003), where the Court of Appeals, in applying principles of statutory construction to the witness tampering statute in MCL 750.122, stated: "[A]s we examine the language used in MCL 750.122(6), we are mindful that the precise statutory description of the prohibited criminal conduct, not necessarily notions of witness tampering that existed at common law, under other statutes, or even under other subsections of MCL 750.122, guides our interpretation." *Id*. at 438–439. In a footnote, the Court also held that a statement made by two previous Court of Appeals opinions that "the Legislature codified the common law crime of obstruction of justice" was merely dicta and did not have the force of law because the statute was not at issue in either of those two cases. *Id*. at 438 n 6. As a result, the Court concluded: "[W]e are not persuaded that, contrary to the

plain language in the statute . . ., MCL 750.122(6) [interference] follows any common law approach to obstruction of justice that would require threats, intimidation, or physical interference as elements of this offense." *Id*.

1. Contours of Common-Law Obstruction of Justice

A person obstructs justice when he or she specifically intends to dissuade a witness through threats or coercion from testifying in a judicial proceeding. The attempt may be made through words or actions and need not be successful, but it must unambiguously refer to the victim's testimony. *People v Coleman*, 350 Mich 268, 280 (1957).

A defendant who uses an unlawful means to intentionally dissuade or prevent, or to attempt to intentionally dissuade or prevent, a witness from testifying is guilty of common-law obstruction of justice—actual witness intimidation is not required. *People v Williams*, 481 Mich 942 (2008). In *Williams*, the defendant knowingly violated a no-contact order by sending a letter to the victim asking her to drop the charges. In addition, the defendant put a false return address on the envelope in an attempt to conceal her violation of the no-contact order. On these facts, the Supreme Court concluded that there was sufficient evidence to convict the defendant of common-law obstruction of justice. *Id*.

A statement to a potential witness that "You're making a mistake" does not unambiguously refer to the witness' impending testimony and thus there was no probable cause to believe that defendant intended to obstruct justice. *People v Tower*, 215 Mich App 318, 320-321 (1996).

2. Penalties

A violation of common-law obstruction of justice is a felony punishable by imprisonment for not more than 5 years or a maximum $10,000.00 fine, or both. MCL 750.505.

3. Sex Offender Registration

Common-law obstruction of justice is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

3.25 Prostitution, Soliciting and Accosting, Pandering

The activity known as prostitution is proscribed by numerous crimes within chapter LXVII ("Prostitution") of Michigan's Penal Code, as follows:

- Soliciting and accosting to commit prostitution, MCL 750.448.

- Admitting to place for purpose of prostitution, MCL 750.449.
- Male person engaging services for purpose of prostitution, lewdness, or assignation, MCL 750.449a.
- Aiding and abetting, MCL 750.450.
- Keeping a house of ill-fame, MCL 750.452.
- Leasing houses for purposes of prostitution, MCL 750.454.
- Pandering, MCL 750.455.
- Placing wife in house of prostitution, MCL 750.456.
- Accepting earnings of prostitute, MCL 750.457 .
- Detaining female in house of prostitution for debt, MCL 750.458.
- Transporting female for prostitution, MCL 750.459.
- Employing female under 17 in house of prostitution, MCL 750.462.

Listed below for discussion are the crimes of prostitution, soliciting and accosting, and pandering.

A. Prostitution

"Engaging or Offering to Engage Services of Female," MCL 750.449a covers conduct known as "prostitution." However, this statute only appies to a male who engages or offers to engage the services of a female. The crime of soliciting and accosting, discussed in the next subsection, covers prostitution regardless of the sex of the person engaging or engaged by the services.

1. Statutory Authority

MCL 750.449a provides:

> "Any male person who engages or offers to engage the services of a female person, not his wife, for the purpose of prostitution, lewdness or assignation, by the payment in money or other forms of consideration, is guilty of a misdemeanor. Any person convicted of violating this section shall be subject to the provisions of Act No. 6 of the Public Acts of the Second Extra Session of 1942, being sections 329.201 to 329.208 of the Compiled Laws of 1948."*

*MCL 329.201-329.208 were repealed by 1978 PA 368, effective September 30, 1978.

This statute does not apply to a law enforcement officer while in the performance of his or her duties. MCL 750.451a.

2. Penalties

A violation of MCL 750.449a is a misdemeanor punishable by imprisonment in the county jail for not more than 90 days or a maximum $500.00 fine, or both.*

*Regarding the punishment and fine, see MCL 750.504, Punishment of Misdemeanors When Not Fixed by Statute.

3. Sex Offender Registration

MCL 750.449a is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

4. Pertinent Case Law

The scope of "prostitution" is not limited to sexual intercourse in exchange for money; it also includes the sexual stimulation of a penis by direct manual contact in exchange for money. *People v Warren*, 449 Mich 341, 346 (1995).* The Supreme Court in *Warren* also intimated that "prostitution" may include more activities than masturbatory massages:

*_People v Warren_ construed two criminal statutes: accepting earnings of a prostitute, MCL 750.457, and maintaining a house of prostitution, MCL 750.452.

> "Appellate decisions often describe 'prostitution' with a reference to sexual intercourse. However, such references rarely constitute a judicial holding that other paid sexual acts, such as fellatio, cunnilingus, anal intercourse, or masturbation are *not* prostitution. Exceptions exist, but we find them less persuasive than decisions that have found that it is prostitution to perform masturbatory massages for money." *Id*. [Emphasis in original.]

The word "prostitution," as used under the nuisance abatement statute, MCL 600.3801, includes "manual stimulation of another person for the payment of money"; "prostitution" is also not unconstitutionally vague and provides fair notice of the proscribed conduct. *State ex rel Macomb County Prosecuting Attorney v Mesk*, 123 Mich App 111, 118 (1983).

"Prostitution," as used under the accepting earnings of a prostitute, MCL 750.457, includes an agreement to perform fellatio in exchange for money when the person "initiated physical contact" with a customer's "private areas." *People v Morey*, 230 Mich App 152, 156 (1998), aff'd 461 Mich 325 (1999).

B. Soliciting and Accosting

Th crime of soliciting and accosting covers conduct known as "prostitution," regardless of the sex of the person soliciting and accosting or the person being solicited and accosted.

1. Statutory Authority

2002 PA 45 amended MCL 750.448, effective June 1, 2002).

MCL 750.448* proscribes the soliciting, accosting, or inviting of another person to commit prostitution or to do any other lewd or immoral act:

> "A person 16 years of age or older who accosts, solicits, or invites another person in a public place or in or from a building or vehicle, by word, gesture or any other means, to commit prostitution or to do any other lewd or immoral act, is guilty of a crime punishable as provided in section 451 [MCL 750.451]."

2. Penalties

A violation of MCL 750.448 is a misdemeanor punishable by imprisonment for not more than 93 days or a maximum $500.00 fine, or both. MCL 750.451(1).

*A "prior conviction" means a violation of MCL 750.448, MCL 750.449, MCL 750.449a, MCL 750.450, MCL 750.462, or a violation of another state or a political subdivison of this state or another state substantially corresponding to the foregoing statutes. MCL 750.451(5).

A defendant who has a "prior conviction"* is guilty of a misdemeanor punishable by imprisonment for not more than one year or a maximum $1,000.00 fine, or both. MCL 750.451(2).

A defendant who has one or more prior convictions is guilty of a felony punishable by imprisonment for not more than two years or a maximum $2,000.00, or both. MCL 750.451(3).

Under MCL 750.451(4), a prosecutor who intends to seek an enhanced sentence based upon the defendant having one or more prior convictions must include on the complaint and information a statement listing the prior conviction(s). Additionally, the court, without a jury, must determine the existence of the defendant's prior convictions at sentencing or at a separate hearing before sentencing. *Id*. Finally, MCL 750.451(4)(a)-(d) provides that the existence of a prior conviction may be established by any evidence relevant for that purpose, including, but not limited to, one or more of the following:

> "(a) A copy of the judgment of conviction.
>
> "(b) A transcript of a prior trial, plea-taking, or sentencing.
>
> "(c) Information contained in a presentence report.
>
> "(d) The defendant's statement."

3. Sex Offender Registration

MCL 750.448 is a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

4. Pertinent Case Law

The solicitation statute applies to two-party situations in which one party, through words or conduct, invites another to perform an immoral act. *People v Mabry*, 102 Mich App 336, 337-338 (1980); see also *People v Masten*, 414 Mich 16, 18-20 (1982).

C. Pandering

1. Statutory Authority

MCL 750.455 makes it unlawful to commit any one of the following eight specific activities:*

*See *People v Morey*, 461 Mich 325, 337-338 (1999).

- Procure a female inmate for a house of prostitution.
- Induce, persuade, encourage, inveigle or entice a female person to become a prostitute.
- By promises, threats, violence or by any device or scheme, shall cause, induce, persuade, encourage, take, place, harbor, inveigle or entice a female person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed.
- By promises, threats, violence or by any device or scheme, cause, induce, persuade, encourage, inveigle or entice an inmate of a house of prostitution or place of assignation to remain therein as such inmate.
- By promises, threats, violence, by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, shall take, place, harbor, inveigle, entice, persuade, encourage, or procure any female person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution.
- Inveigle, entice, persuade, encourage, or procure any female person to come into this state or to leave this state for the purpose of prostitution.
- Upon the pretense of marriage takes or detains a female person for the purpose of sexual intercourse.
- Receive or give or agree to receive or give any money or thing of value for procuring or attempting to procure any female person to become a prostitute or to come into this state or leave this state for the purpose of prostitution, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than twenty [20] years.

2. Elements of Offense

The elements of pandering are listed in CJI2d 20.34 and paraphrased below as follows:

1) First, that [choose one of the following]:

   a) defendant forced or persuaded or encouraged or tricked the victim to become a prostitute; or,

   b) defendant took or agreed to take or gave or agreed to give money or anything of value for making or attempting to make the victim become a prostitute.

2) Second, that defendant did this knowingly and intentionally.

3. Definition of Terms

The plain and ordinary meaning of "encourage," "inveigle," and "entice" means that "pandering may be accomplished even though the actor does not successfully persuade his victim to become a prostitute." *People v Rocha*, 110 Mich App 1, 14-15 (1981). While the statute's words "induce," "inveigle," "persuade," and "entice" all imply an "active leading to a particular action," the word "encourage" indicates a less active role and falls short of persuading. *People v Springs*, 101 Mich App 118, 127 (1980).

The pandering statute's phrase "to become a prostitute" punishes a person who induces a female not currently a prostitute to "become a prostitute"; it does not punish a person who induces a female who is already a prostitute or who is reasonably believed to already be a prostitute. See *People v Morey*, 461 Mich 325, 337-338 (1999); and *People v Slipson*, 154 Mich App 134, 138 (1986). Whether a female is a prostitute is a question of fact. *Morey*, *supra* at 337. In cases involving a female who has previously performed acts of prostitution, the trier of fact "must determine whether she has effectively abandoned prostitution, only to be led astray again by the defendant." *Id*. at 337-338.

"Assignation" is "an offer to perform sexual services for the payment of money." *State ex rel Macomb County Prosecuting Attorney v Mesk*, 123 Mich App 111, 120 (1983).

4. Penalties

A violation of MCL 750.455 is a felony punishable by imprisonment for not more than 20 years. MCL 750.455.

5. Sex Offender Registration

MCL 750.455 is a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

3.26 Seduction

A. Statutory Authority and Penalties

MCL 750.532 punishes a man who seduces and debauches any unmarried woman. MCL 750.532 states as follows:

> "Any man who shall seduce and debauch any unmarried woman shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by fine of not more than 2,500 dollars; but no prosecution shall be commenced under this section after 1 year from the time of committing the offense."

B. Sex Offender Registration

MCL 750.532 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

C. Pertinent Case Law

Seduction is defined in *People v Smith*, 132 Mich 58, 61 (1902), quoting *People v Gibbs*, 70 Mich 425, 430 (1888), as follows:

> "[T]he act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have, and do have, that effect, and resulting in her ultimately submitting her person to the sexual embraces of the person accused."

An act of sexual intercourse induced simply by a mutual desire to gratify a lustful passion does not constitute the crime of seduction. *People v DeFore*, 64 Mich 693, 699 (1887).

A false promise of marriage is not essential for seduction; all acts, artifices, influences, promises, enticements, and inducements used to accomplish the same criminal result will constitute seduction. *People v Gibbs*, *supra* at 427-428 (false promise to buy clothes constituted a sufficient promise).

If a promise of marriage is used to seduce the woman, and the promise is kept and performed, it is against public policy to permit prosecution for seduction. *People v Gould*, 70 Mich 240, 245 (1888).

The nature of the promise and the previous character of the woman as to chastity must be considered; a promise of compensation to a prostitute is not seduction. *People v Clark*, 33 Mich 112, 117 (1876).

Sexual intercourse with a mature woman induced by a promise of marriage conditioned on the woman becoming pregnant is not sufficient to constitute seduction. *People v Smith*, *supra* at 62.

3.27 Sex Offender Registration

Michigan's "Sex Offenders Registration Act" ("SORA"), MCL 28.721 et seq., provides criminal penalties for an individual who fails to register (or verify such information) after being "convicted" of a "listed offense." For information on SORA's criminal provisions, see Section 11.2(K).

3.28 Sexual Delinquency

A. Background and Statutory Structure

*Formerly, Michigan had the Criminal Sexual Psychopathic Persons Act, MCL 780.501 et seq., which provided for the involuntary commitment of criminal sexual psychopathic persons. However, that Act was repealed by 1968 PA 143, effective June 12, 1968.

In Michigan, a person may be charged with and convicted of being a "sexually delinquent person."* However, Michigan's "sexually delinquent person" crime is not a single, stand-alone crime. Instead, it is part of a comprehensive "unified statutory scheme" that includes a definitional statute, MCL 750.10a, a procedural statute, MCL 767.61a, and an alternative sentencing provision, which is contained in five separate sex offenses. See *People v Winford*, 404 Mich 400, 405 (1978); and *People v Helzer*, 404 Mich 410, 419 (1978). Because of this "unified statutory scheme," a charge of sexual delinquency may only be brought in conjunction with one of the five sex offenses that explicitly refer to sexual delinquency and provide for alternate sentencing. See *People v Seaman*, 75 Mich App 546, 548-549 (1977); and *Helzer*, *supra* at 417. These five sex offenses, all of which concern indecency and immorality, *People v Seaman*, *supra* at 549, are as follows:

- Gross Indecency—Males, MCL 750.338.
- Gross Indecency—Females, MCL 750.338a.
- Gross Indecency—Male-Female, MCL 750.338b.
- Crime Against Nature (Sodomy/Bestiality), MCL 750.158.
- Indecent Exposure, MCL 750.335a.

A. Alternate Sentencing Language; Penalty

The sexual delinquency alternate sentencing language contained in the foregoing sexual offenses is as follows:

> "[I]f such person was at the time of the said offense a sexually delinquent person, [then he or she] may be [punished] by imprisonment in the state prison for an

> indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life."

B. Definitional Statute

MCL 750.10a defines a "sexually delinquent person" as any person whose sexual behavior is characterized by any of the following:

- "[R]epetitive or compulsive acts which indicate a disregard of consequences or the recognized rights of others."
- "[T]he use of force upon another person in attempting sex relations of either a heterosexual or homosexual nature."
- "[T]he commission of sexual aggressions against children under 16."

C. Procedural Statute and Court Procedures

MCL 767.61a contains the procedures and duties of the court regarding "sexual delinquency":

> "In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in [MCL 768.35*], and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense."

*MCL 768.35 governs the procedure for accepting guilty pleas.

The following procedures apply to sexual delinquency cases, and have been culled from the following cases: *People v Winford*, 404 Mich 400 (1978); *People v Helzer*, 404 Mich 410 (1978); *People v Murphy*, 203 Mich App 738

(1994); *People v Oswald (After Remand)*, 188 Mich App 1 (1991); and *People v Kelly*, 186 Mich App 524 (1990).

1. Charging Discretion

A person can only be lawfully charged with sexual delinquency when the principal offense is also charged; the principal offense must explicitly specify sexual delinquency. *Helzer*, *supra* at 417 n 10.

A sexual delinquency charge must be included in the same charging document or by amendment of the indictment or information before trial begins; a sexual delinquency charge cannot be brought after trial begins (a prosecutor will have waived the opportunity to bring a sexual delinquency charge). *Id.* at 424-426.

2. Circuit Court Jurisdiction

If the sexual delinquency charge involves a misdemeanor as the underlying offense, the prosecutor should bring the prosecution in circuit court under the concurrent jurisdiction statute, MCL 767.1. If the prosecutor initially charges only the principal misdemeanor offense and later, but before trial, amends and charges sexual delinquency, the proceedings are subject to transfer to circuit court. *Winford*, *supra* at 408 n 11.

3. Preliminary Examinations

A person charged with sexual delinquency is entitled to a preliminary examination, but the magistrate need only find probable cause on the principal offense, not on the sentencing provision charging sexual delinquency. *Id.* at 408 n 10.

4. Trial

A person charged with sexual delinquency has a right, unless waived, to a second jury trial by a different jury immediately after conviction on the principal offense. The trial judge who presided over the first jury trial must preside over the second jury trial. *Helzer*, *supra* at 424.

At the time the initial jury is empaneled on the principal charge, a defendant should be allowed only the number of peremptory challenges appropriate to the possible sentence on the principal charge. A defendant is entitled to 20 peremptory challenges in the empaneling of the second jury hearing the sexual delinquency charge. *Id*.

A defendant is entitled to a jury trial on the sexual delinquency charge, even where a guilty plea has been entered on the principal charge. *Id*. at 419 n 15.

Proof of sexual delinquency may involve more than the simple ministerial considerations of proving prior convictions. Although prior convictions may

be used to obtain a guilty verdict, sexually delinquency is not explicitly dependent upon any prior conviction, except the principal offense. The only limitation is that a factfinder must weigh the acts specified in MCL 750.10a. *Oswald (After Remand)*, *supra* at 11-12; and *Murphy*, *supra* at 746.

MCL 767.61a mandates a separate hearing and record in which pscyhiatric and expert testimony is required. *People v Helzer*, *supra* at 419 n 13.

In every sexual delinquency prosecution, if requested by an indigent defendant, the Court must provide expert testimony for the defense. MCL 767.61a.

5. Burden of Proof and Timing

The standard of proof for proving sexual delinquency is beyond a reasonable doubt. *Helzer*, *supra* at 417.

The relevant time to fix the determination of sexual delinquency is at the time of the principal offense. *Id.* at 417 n 8.

6. Convictions and Court's Duty to Investigate

The crime of sexual delinquency is a felony and not a quasi-civil commitment. *Murphy*, *supra* at 748-749.

A defendant charged with sexual delinquency cannot be convicted of sexual delinquency without a conviction on the principal offense. *Helzer*, *supra* at 417.

If a defendant pleads guilty to both the principal and sexual delinquency offenses, the Court must, after conviction but before sentencing, separately investigate the circumstances surrounding the sexual delinquency. *Id.* at 419 n 15, and MCL 767.61a.

> **Note:** MCL 767.61a states in pertinent part: "In the event the accused shall plead guilty to both charges in such indictment, the court . . . before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony." This testimony may include any competent medical, sociological or psychological testimony which might aid in the determination of defendant's mental and physical condition at the time of the principal offense. *Helzer*, *supra* at 419 n 14.

7. Sentencing

A person convicted of sexual delinquency can only be sentenced once, not twice, upon conviction of the principal charge and the sexual delinquent charge; the trial court has the discretion to sentence the defendant under the

terms of the principal charge or under the terms of the sexual delinquency charge, but not both. *Winford*, *supra* at 404 n 5.

A person sentenced under the sexual delinquency provisions and not the underlying offense must be sentenced to an indeterminate sentence of one day to life in prison; a sentence of "life imprisonment" is reversible error "[b]ecause the statute at issue provides that the minimum of the indeterminate term *shall* be one day and the maximum *shall* be life . . ." *People v Kelly*, 186 Mich App 524, 529 (1990). [Emphasis in original.] See also *People v Butler*, 465 Mich 937 (2001) (sentence of 2 to 20 years vacated because "there is no alternative to the mandatory indeterminate sentence of one day to life in prison"). The sexual delinquent sentencing scheme is an exception to the indeterminate sentencing provisions. *Kelly*, *supra* at 531.

Probation can be imposed upon conviction for being a sexually delinquent person. In *Butler*, *supra*, as part of its order vacating a sentence of 2 to 20 years for a defendant convicted of indecent exposure and for being a sexually delinquent person, the Michigan Supreme Court made the following comments regarding probation: "[A] sentence of probation can be imposed on a conviction of being a sexually delinquent person, since neither the indecent exposure statute nor the sexually delinquent person statute contain any statement affecting the availability of probation, and the offense of being a sexually delinquent person isn't listed as an exception to the otherwise inclusive application of the probation statute, MCL 771.1(1)."

D. Sex Offender Registration

An offense committed by a "sexually delinquent person," as defined in MCL 750.10a, is a "listed offense" under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA's registration and public notification requirements, see Section 11.2.

3.29 Sexual Intercourse Under Pretext of Medical Treatment

MCL 750.90 punishes a person who medically treats a female and falsely represents that it is necessary or beneficial to have sexual intercourse and the female does engage in the sexual intercourse with another man not her husband.

A. Statutory Authority and Penalties

MCL 750.90 states as follows:

> "Any person who shall undertake to medically treat any female person, and while so treating her, shall represent to such female that it is, or will be, necessary or beneficial to

her health that she have sexual intercourse with a man, and shall thereby induce her to have carnal sexual intercourse with any man, and any man, not being the husband of such female, who shall have sexual intercourse with her by reason of such representation, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years."

Note: This offense is similar to the CSC Act's "force or coercion" provisions governing sexual penetrations or contacts that involve the unethical or unacceptable medical treatment or examination of a person. See MCL 750.520b(1)(f)(iv) (CSC-I), and MCL 750.520e(1)(b)(iv) (CSC-IV).* However, unlike the "force or coercion" provisions under the CSC Act, this offense is restricted to "sexual intercourse" and does not include sexual contact. The "sexual intercourse" under this offense need not be with the person providing the medical treatment, but can be with "any man" if the sexual intercourse is represented as necessary or beneficial to the victim's health.

*CSC-II and III incorporate by reference CSC-I's definition of "force or coercion." See Section 2.5(I).

B. Definition of "Sexual Intercourse"

"Sexual intercourse" is not defined in the chapter of the Penal Code in which this offense appears. For a definition of "sexual intercourse" in other contexts, see the following:

- MCL 722.672(e) (dissemination of sexually explicit matter to minors)
- MCL 750.145c(1)(*l*) (child sexually abusive activity)

C. Sex Offender Registration

MCL 750.90 is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

3.30 Solicitation to Commit a Felony

"Solicitation" is one of three "inchoate" offenses discussed in this chapter.* An inchoate (pronounced in-KOH-it) offense is defined as a "step toward the commission of another crime, the step in itself being serious enough to merit punishment." *Black's Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 1108.

*The other inchoate offenses are attempt and conspiracy. See Sections 3.6 and 3.8, respectively.

A. Statutory Authority and Penalties

MCL 750.157b states as follows:

> "(1) For purposes of this section, 'solicit' means to offer to give, promise to give, or give any money, services, or anything of value, or to forgive or promise to forgive a debt or obligation.
>
> * * *
>
> "(3) Except as provided in subsection (2) [solicitation of murder], a person who solicits another person to commit a felony, or who solicits another person to do or omit to do an act which if completed would constitute a felony, is punishable as follows:
>
> > "(a) If the offense solicited is a felony punishable by imprisonment for life, or for 5 years or more, the person is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine not to exceed $5,000.00, or both.
> >
> > "(b) If the offense solicited is a felony punishable by imprisonment for a term less than 5 years or by a fine, the person is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or by a fine not to exceed $1,000.00, or both, except that a term of imprisonment shall not exceed 1/2 of the maximum imprisonment which can be imposed if the offense solicited is committed.
> >
> > "(4) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose, the actor notified the person solicited of his or her renunciation and either gave timely warning and cooperation to appropriate law enforcement authorities or otherwise made a substantial effort to prevent the performance of the criminal conduct commanded or solicited, provided that conduct does not occur. The defendant shall establish by a preponderance of the evidence the affirmative defense under this subsection."

B. Elements of Offense

The elements of solicitation of a felony are listed in CJI2d 10.6 and paraphrased below as follows:

(1) First, that the defendant, through words or actions, offered, promised, or gave money, services, or anything of value [or forgave or promised to forgive a debt or obligation owed] to another person.

(2) Second, that the defendant intended that what he or she said or did would cause [state underlying crime] to be committed. The crime of [state underlying crime] is defined as [summarize all the elements of the crime solicited].

(3) Third, that the prosecutor does not have to prove that the person the defendant solicited actually committed, attempted to commit, or intended to commit [state underlying crime].

C. Sex Offender Registration

MCL 750.157b is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

D. Pertinent Case Law

1. Specific Intent Crime

Solicitation to commit a felony under MCL 750.157b is a specific intent crime, and requires proof that defendant intended the commission of the crime solicited. *People v Vandelinder*, 192 Mich App 447, 450 (1992).

2. Solicitation Generally

Solicitation requires proof of value to induce another to commit the crime solicited. MCL 750.157b(1).

Solicitation is complete when the solicitation is made; it does not matter that the underlying crime is not accomplished or attempted. *Vandelinder*, *supra* at 450-451.

A "conditional solicitation," i.e., soliciting another to commit a felony only if certain conditions exist, is still solicitation. *Id*.

3. Defenses

The doctrine of impossibility does not provide a defense to solicitation in Michigan. *People v Thousand*, 465 Mich 149 (2001). For more information on the impossibility defense and the *Thousand* case, see Section 4.9.

The affirmative defense of renunciation is a defense to solicitation and must be proved by a preponderance of the evidence by defendant. See MCL 750.157b(4); and CJI2d 10.7. For more information on the defense of renunciation, see Section 4.3.

3.31 Stalking and Aggravated Stalking

Sexual assault perpetrators often stalk their victims. Sometimes they stalk their victims as a surveillance method to gain information to facilitate the sexual assault. Other times they stalk their victims to engage in ongoing harassment and pressure tactics, including multiple phone calls, homicide or suicide threats, uninvited visits at home or work, and manipulation of children—all to exercise power or control over the victim, or, in the case of post-sexual assault stalking, to pressure and dissuade the victim from pursuing criminal or civil action against the perpetrator. This stalking behavior, which can also be used against people other than the victims, such as potential witnesses and the victims' family members and relatives, may be actionable under Michigan's stalking or aggravated stalking statutes.

A. Stalking

1. Statutory Authority

Stalking is a criminal misdemeanor. MCL 750.411h(1)(d) defines the elements of stalking as follows:

- ". . . a willful course of conduct involving repeated or continuing harassment of another individual";
- "that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested"; and
- "that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

In a criminal prosecution for stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4).

2. Definition of Terms

The following definitions further explain this offense:

- A "**course of conduct**" involves a series of two or more separate, noncontinuous acts evidencing a continuity of purpose. MCL 750.411h(1)(a).

- "**Harassment**" means conduct including, but not limited to, repeated or continuing unconsented contact that would cause a reasonable person to suffer emotional distress, and that actually causes the victim emotional distress. Harassment does not include constitutionally protected activity or conduct serving a legitimate purpose. MCL 750.411h(1)(c).

- "**Emotional distress**" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling. MCL 750.411h(1)(b).

- "**Unconsented contact**" includes, but is not limited to:

– Following or appearing within the victim's sight;

– Approaching or confronting the victim in a public place or on private property;

– Appearing at the victim's workplace or residence;

– Entering onto or remaining on property owned, leased, or occupied by the victim;

– Contacting the victim by phone, mail, or electronic communications; or

– Placing an object on, or delivering an object to, property owned, leased, or occupied by the victim. MCL 750.411h(1)(e).

3. Penalties

Except in cases where the victim is less than 18 years of age and the offender is five or more years older than the victim, misdemeanor stalking is punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.00. MCL 750.411h(2)(a). Under MCL 750.411h(3), the court may place the offender on probation for term of not more than five years.* If the court orders probation, it may impose any lawful condition of probation. In addition, it may order the offender to:

- Refrain from stalking any individual during the term of probation;

- Refrain from having any contact with the victim of the offense; or,

- Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her expense.

MCL 750.411h(2)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, stalking is a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both.

4. Sex Offender Registration

MCL 750.411h is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

B. Aggravated Stalking

Under MCL 750.411i(2), a person who engages in stalking is guilty of the felony of aggravated stalking if the violation involves any of the following circumstances:

- At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court—violations of sister state or tribal orders may also result in aggravated stalking charges.
- At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.
- The person's conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim's household. A "credible threat" is a threat to kill or to inflict physical injury on another person, made so that it causes the person hearing the threat to reasonably fear for his/her own safety, or for the safety of another. MCL 750.411i(1)(b).
- The offender has been previously convicted of violating either of the criminal stalking statutes.

In a criminal prosecution for aggravated stalking, evidence that the defendant continued to make unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411i(5).

5. Penalties

*MCL 771.2a(2), makes similar provision.

Except in cases where the victim is less than 18 years of age and the offender is five or more years older than the victim, aggravated stalking is punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both. MCL 750.411i(3)(a). Under MCL 750.411i(4), the court may place an offender on probation for any term of years, but not less than five years.* If it orders probation, the court may impose any lawful condition, and may additionally order the offender to:

- refrain from stalking any individual during the term of probation;
- refrain from any contact with the victim of the offense; or
- be evaluated to determine the need for psychiatric, psychological, or social counseling, and to receive such counseling at his or her own expense.

MCL 750.411i(3)(b), provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, aggravated stalking is punishable by imprisonment for not more than ten years or a fine of not more than $15,000.00, or both.

If a prisoner convicted of aggravated stalking (MCL 750.411i) is paroled and the victim has registered to receive notification about that prisoner, the prisoner's parole order must require that the prisoner's location be monitored by a global positioning monitoring system during the entire parole period. MCL 791.236(18).

Note: If at the time the prisoner was paroled no victim of that crime had registered to receive notification, but a victim registers to receive notification after the prisoner's parole, the parole order must *immediately* be modified to include the requirement that the prisoner's location be monitored by a global positioning system. MCL 791.236(18).

6. Sex Offender Registration

MCL 750.411i is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

C. Elements of Stalking and Aggravated Stalking

The elements of both misdemeanor and felony stalking are listed in CJI2d 17.25 and paraphrased as follows:

1) The defendant committed two or more willful, separate, and noncontinuous acts of unconsented contact with the victim;
2) The contact would cause a reasonable individual to suffer emotional distress;
3) The contact caused the victim to suffer emotional distress;
4) The contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested;
5) The contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

For aggravated stalking, add the following:

6) The stalking was committed in violation of a court order;

7) The stalking included the defendant making one or more credible threats against the victim, a member of his or her family, or someone living in his or her household; or,

8) The stalking was a second or subsequent offense.

D. Defenses to Stalking

MCL 750.411h(1)(c) creates defenses to stalking for "constitutionally protected activity" or "conduct that serves a legitimate purpose." A similar defense exists under the aggravated stalking statute, MCL 750.411i(1)(d).

1. Legitimate Purpose

The Michigan Court of Appeals addressed the legitimate purpose defense in the following case:

♦ *People v Coones*, 216 Mich App 721, 725-726 (1996):

> Defendant was not entitled to a jury instruction on the "legitimate purpose" defense under the aggravated stalking statute, despite his assertions that contact with his estranged wife was made for the purpose of preserving their marriage. Defendant forcibly entered his wife's residence after she had obtained a restraining order against him, in violation of the order. Given this illegitimate conduct on defendant's part, his "ends justifies the means" argument did not require the trial court to instruct the jury on "legitimate purpose" under the statute.

♦ *Nastal v Henderson & Associates Investigations, Inc*, 471 Mich 712, 726 (2005):

> The Michigan Supreme Court held that surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by the Private Detective License Act, MCL 338.821 *et seq.* MCL 338.822(b) provides that licensed private investigators may obtain information with reference to any of the following:
>
> > "(*i*) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.

> "(*ii*) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> "(*iii*) The location, disposition, or recovery of lost or stolen property.
>
> "(*iv*) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
>
> "(*v*) Securing evidence to be used before a court, board, officer, or investigating committee."

In *Nastal*, the plaintiff sued the owner-operator of a tractor-trailer for negligence. The owner-operator's insurance company hired defendant, a licensed private investigation firm, to perform surveillance of plaintiff. Defendant surveilled plaintiff on four separate occasions. On each occasion, the surveillance was terminated because the investigators determined that the plaintiff knew he was being observed and any further surveillance at that time would serve no further purpose. The plaintiff filed a civil stalking claim pursuant to MCL 600.2954. The defendants argued that the investigators were engaged in conduct that served a legitimate purpose under MCL 750.411h(1)(c) and therefore could not be guilty of stalking. The Michigan Supreme Court agreed with the defendants and held that when a licensed private investigator is conducting surveillance to obtain evidence concerning a party's claim in a lawsuit, the activity falls within the legitimate purpose defense to stalking. *Nastal, supra* at 724.

2. Constitutionally Protected Activity

♦ *People v White*, 212 Mich App 298, 308-313 (1995):

> The stalking statutes are not overbroad and do not impinge on the defendant's constitutional right to free speech. The statutes specifically exclude constitutionally protected speech, addressing instead a willful pattern of unconsented conduct—including conduct combined with speech—that would cause distress to a reasonable person. Defendant's repeated verbal threats to kill the victim and members of her family were neither protected speech nor conduct serving a "legitimate purpose" of reconciliation. *Id*. at 310-311.

The stalking laws provide fair notice of the proscribed conduct. The U.S. Supreme Court has stated that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson*, 461 US 352, 357 (1983). Here, a person of reasonable intelligence would not need to guess at the meaning of the stalking statutes. The definitions of crucial words and phrases in the statutes are clear and understandable to a reasonable person reading the statute. Also, the meaning of the words used in the statutes can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the words themselves, because they possess a common and generally accepted meaning. *White*, *supra* at 312.

The trial court's discretion to decide whether the complainant receives a series of contacts in a positive or negative fashion does not render the statutes vague. The Court of Appeals held that vagueness can only be established if the wording of the statute itself is vague. *Id*. at 313.

See also *Staley v Jones*, 239 F3d 769 (CA 6, 2001), which revisited and reaffirmed the issues decided in *White*, *supra*.

3.32 Unlawful Imprisonment

E. A.Statutory Authority and Penalties

A person who knowingly restrains another person under any of the following circumstances has committed the crime of unlawful imprisonment:

- use of a weapon or dangerous instrument to restrain the person.
- the person restrained was secretly confined.
- the person was restrained in order to facilitate the commission of another felony or to facilitate flight after another felony was committed. MCL 750.349b(1)(a)–(c).

The crime of unlawful imprisonment is a felony punishable by not more than 15 years of imprisonment or a fine of not more than $20,000.00, or both. MCL 750.349b(2). In addition, a defendant may be charged with, convicted of, or sentenced for any other violation of law occurring during the defendant's commission of the unlawful imprisonment violation. MCL 750.349b(4).

F. B.Definitions of Relevant Statutory Terms

MCL 750.349b(3) defines the following terms:

- **"'Restrain'** means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349b(3)(a).

- **"Secretly confined"** means "[t]o keep the confinement of the restrained person a secret [or t]o keep the location of the restrained person a secret." MCL 750.349b(3)(b).

3.33 Vulnerable Adult Abuse

The vulnerable adult abuse statute can be charged in lieu of a sexual assault crime or in conjunction with one. The statute specifically provides that a conviction or sentence for vulnerable adult abuse does not preclude a conviction or sentence for a violation of "any other applicable law." MCL 750.145q. The vulnerable adult abuse statute punishes a caregiver (or person with authority over the vulnerable adult) who causes "physical harm," serious physical harm," or "serious mental harm" to a vulnerable adult.

A. Statutory Authority and Penalties

MCL 750.145n(1)-(4) delineates four degrees of vulnerable adult abuse:

1. First Degree

> "(1) A caregiver is guilty of vulnerable adult abuse in the first degree if the caregiver intentionally causes serious physical harm or serious mental harm to a vulnerable adult. Vulnerable adult abuse in the first degree is a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

2. Second Degree

> "(2) A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the second degree if the reckless act or reckless failure to act of the caregiver or other person with authority over the vulnerable adult causes serious physical harm or serious mental harm to a vulnerable adult. Vulnerable adult abuse in the second degree is a felony punishable by

imprisonment for not more than 4 years or a fine of not more than $5,000.00, or both.

3. Third Degree

"(3) A caregiver is guilty of vulnerable adult abuse in the third degree if the caregiver intentionally causes physical harm to a vulnerable adult. Vulnerable adult abuse in the third degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,500.00, or both.

4. Fourth Degree

"(4) A caregiver or other person with authority over the vulnerable adult is guilty of vulnerable adult abuse in the fourth degree if the reckless act or reckless failure to act of the caregiver or other person with authority over a vulnerable adult causes physical harm to a vulnerable adult. Vulnerable adult abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both."

Alternatively, or in addition to the foregoing penalties, a court may sentence a defendant to perform community service under MCL 750.145r, subject to the following maximum limitations:

1) Not more than 160 days if defendant is convicted of a felony.

2) Not more than 80 days if defendant is convicted of a misdemeanor.

> **Note:** Community service shall not include "activities involving interaction with or care of vulnerable adults." MCL 750.145r(2). Furthermore, a defendant "shall not receive compensation" for such community service, and "shall reimburse" the state or local government for expenses incurred in the supervision of defendant's performance of community service. MCL 750.145r(3).

B. Sex Offender Registration

MCL 750.145n is not specifically designated a "listed offense" under the Sex Offenders Registration Act (SORA). For more information on SORA's registration and public notification requirements, see Section 11.2.

C. Elements of Offense

The elements of the four degrees of vulnerable adult abuse are listed in CJI2d 17.30-17.33 and combined and paraphrased below as follows:

1) First, that defendant was a caregiver of the victim.

2) Second, that [choose one of the following]:

a) Defendant intentionally caused serious physical harm or serious mental harm to the victim (**1st degree**).

b) Defendant, by his or her reckless act or reckless failure to act, caused serious physical harm or serious mental harm to the victim (**2nd degree**).

c) Defendant intentionally caused physical harm to the victim (**3rd degree**).

d) Defendant, by his or her reckless act or reckless failure to act, caused physical harm to the victim (**4th degree**).

(i) "Serious physical harm" means an injury that threatens the life of a vulnerable adult, causes substantial bodily disfigurement, or seriously impairs the functioning or well-being of the vulnerable adult.

(ii) "Serious mental harm" means an injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner.

(iii) "Physical harm" means any injury to a vulnerable adult's physical condition.

(iv) "Reckless act or failure to act" means that the defendant's conduct demonstrates a deliberate disregard of the likelihood that the natural tendency of the act or failure to act is to cause serious physical harm or serious mental harm.

3) Third, that the victim was at the time a "vulnerable adult." The term "vulnerable adult" means:

a) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical handicap requires supervision or personal care or lacks the personal and social skills required to live independently.

b) A person 18 years of age or older who is placed in an adult foster care family home or an adult foster care small group home.

c) A person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.

D. Definitions of Relevant Statutory Terms

MCL 750.145m defines the following relevant statutory terms:

1) "'Caregiver' means an individual who directly cares for or has physical custody of a vulnerable adult." MCL 750.145m(c).

2) "'Other person with authority over a vulnerable adult' includes, but is not limited to, a person with authority over a vulnerable adult in that part of a hospital that is a hospital long-term care unit, but does not include a person with authority over a vulnerable adult in that part of a hospital that is not a hospital long-term care unit. As used in this subdivision, 'hospital' and 'hospital long-term care unit' mean those terms as defined in section 20106 of the public health code, MCL 333.20106." MCL 750.145m(k).

3) "'Physical harm' means any injury to a vulnerable adult's physical condition." MCL 750.145m(n).

4) "'Reckless act or reckless failure to act' means conduct that demonstrates a deliberate disregard of the likelihood that the natural tendency of the act or failure to act is to cause physical harm, serious physical harm, or serious mental harm." MCL 750.145m(p).

5) "'Serious physical harm' means a physical injury that threatens the life of a vulnerable adult, that causes substantial bodily disfigurement, or that seriously impairs the functioning or well-being of the vulnerable adult." MCL 750.145m(r).

6) "'Serious mental harm' means a mental injury that results in a substantial alteration of mental functioning that is manifested in a visibly demonstrable manner." MCL 750.145m(s).

7) "'Vulnerable adult' means 1 or more of the following:

> "(*i*) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.
>
> "(*ii*) An adult as defined in section 3(1)(b) of the adult foster care facility licensing act, MCL 400.703.
>
> "(*iii*) An adult as defined in section 11(b) of the social welfare act, MCL 400.11." MCL 750.145m(u)(i)-(iii).

E. Pertinent Case Law

1. Specific and General Intent Crimes

By the terms of the statute, first-degree and third-degree vulnerable adult abuse are specific intent crimes; second-degree and fourth-degree are general intent crimes. MCL 750.145n(1)-(4). See also the Use Notes in CJI2d 17.30-17.33.

2. Double Jeopardy Provision

A conviction or sentence for vulnerable adult abuse does not preclude a conviction or sentence for a violation of any other applicable law. MCL 750.145q.

3. Actions Protected Under the Vulnerable Adult Abuse Statute

The vulnerable adult abuse statute "does not prohibit a caregiver or other person with authority over a vulnerable adult from taking reasonable action to prevent a vulnerable adult from being harmed or from harming others." MCL 750.145n(5).

The vulnerable adult abuse statute "does not apply to an act or failure to act that is carried out as directed by a patient advocate under a patient advocate designation executed in accordance with sections 5506 to 5512 of the estates and protected individuals code, 1998 PA 386, MCL 700.5506-700.5512." MCL 750.145n(6).

4. "Pain" Alone is a Symptom and Does Not Constitute "Physical Injury"

Evidence of "pain" alone is insufficient to satisfy the "physical injury" element since it is only a "symptom" of an injury or illness. *People v DeKorte*, 233 Mich App 564, 570-571 (1999) (defendant caregiver's second-degree vulnerable adult abuse conviction reversed where defendant failed to summon medical attention for 16 hours after the victim fell or jumped off the facility roof and sustained severe injuries to her hip, pelvis, and elbow, because no "physical injury" was caused by defendant's failure to act).

5. "But For" Causation

Proof of causation is satisfied when the prosecutor presents evidence that could lead a reasonable person to believe that "but for" the defendant's act or failure to act, the victim's injury would not have occurred. See *People v Hudson*, 241 Mich App 268, 285-286 (2000) (abuse of discretion in binding defendant over on second-degree vulnerable adult abuse where victim fell and broke her hip after being "released" from a geri-chair's restraint system,

because the Court could not conclude that "but for" the defendant's releasing actions the victim's injury would not have occurred).